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April 1, 1986

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APPEAL OF MAXIMA CORP.

IBCA-1828 Decided: *April 1, 1986*

Contract No. 68-01-6466, Environmental Protection Agency.

Government Motion for Summary Judgment granted; Appellant Motion for Summary Judgment denied.

**Contracts: Construction and Operation: Contracting Officer--
Contracts: Disputes and Remedies: Termination for Convenience--
Contracts: Formation and Validity: Governing Law**

CONTIN

Under a guaranteed minimum quantity contract where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

APPEARANCES: Joe R. Reeder, Attorney at Law, Patton, Boggs & Blow, Washington, D.C., for Appellant; Richard Feldman, Government Counsel, Environmental Protection Agency, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

On Cross Motions for Summary Judgment

This is the second opinion issued respecting these Cross Motions for Summary Judgment. In our decision dated September 10, 1985, *Maxima Corp.*, IBCA-1828, 85-3 BCA par. 18,381, 21 I.D. 263, we denied both motions as we found there were disputed questions of material fact requiring resolution. Thereafter, the parties filed with the Board a Parties' Joint Motion for Clarification asking guidance from the Board regarding the disputed facts to provide the basis for a stipulation. Subsequently, in a conference held on November 25, 1985, the parties agreed that the third condition in appellant's letter of September 27, 1982, limiting the services to be called for in the thirteenth month, was based upon appellant's concern that the Environmental Protection Agency (EPA) might exceed appellant's capacity to perform. The parties further agreed that they considered the case ripe for decision of the question of law presented.

Because this opinion is dispositive of the appeal, the factual presentation of the appeal presented in our earlier opinion is set forth in its entirety below.

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On April 23, 1981, EPA issued a request for proposal for a fixed-price, indefinite quantity contract for typing, photocopying, editing, and related services. Maxima Corp. (Maxima) responded with a cost and technical proposal, and included advice that with the lack of quantity definition and the magnitude of fixed costs involved, serious consideration should be given to a contract on a cost reimbursement or labor hour/time and materials type agreement. EPA considered Maxima's prices to be excessive and Maxima advised that the firm could lower its proposed prices if EPA were to increase the minimum quantities. EPA did raise the minimum quantities to half the maximum quantities with the result that Maxima's revised proposal substantially decreased its original prices. The resulting contract was awarded to the Small Business Administration (SBA) by EPA under the 8(a) program for minority and disadvantaged small business firms. SBA subcontracted the entire contract to Maxima, effective October 1, 1981. The performance period was 1 year to September 30, 1982, with 2 additional option years at the election of the Government.

The contract contained the "Termination for Convenience" clause for supply and service contracts. The contract contained 12 attachment pages describing the work to be done with some items providing for a "Guaranteed Minimum No. of Pages" and a "Maximum No. of Pages," and other items providing for a "Guaranteed Minimum No. of Hours" and "Maximum No. of Hours." The face page of the contract contained the following:

Production Requirements Year 1—Guaranteed Minimum ..	$419,009.00
Equipment Charges Year 1	79,689.00
Travel Charges Year 1—Guaranteed Minimum	1,525.00
Total Guaranteed Minimum	500,223.00

The above figures were computed by multiplying the estimated minimum quantities for each type of service by the contract's fixed price for that service.

From the outset of the contract, the services required by Maxima by the issuance of delivery orders were significantly below the minimums expressed in the contract. In monthly progress reports, Maxima reported the amount of work for the period and the work to date on a cumulative basis as a percentage of the minimum quantities. In several of the reports, Maxima noted a concern that the services were being underutilized on the contract. In the waning months of the first year of performance, EPA determined that it did not want to exercise the option to renew the contract with minimum and maximum quantities, but would seek to replace the contract with a cost-reimbursement type. Because of time constraints to process the new contract and desiring continuous service, EPA wanted an extension of 1 month on the

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existing contract. Maxima was asked to provide its cost-reimbursable proposal to provide the service for the following 2 years, which it did by letter of September 13, 1982. The letter also stated Maxima's belief that it should be paid for the initial contract term on the basis of the negotiated fixed-unit prices and minimum guarantees.

The parties met on September 24, 1982, to discuss a 1-month extension of the existing contract and the proposal for the following years on a cost-plus-fixed-fee basis. The parties disagree as to what, if anything, was agreed upon at the meeting. By letter dated September 27, 1982, Maxima discussed the meeting of September 24 and then stated:

> The Maxima Corporation will agree to re-negotiation of the subject contract to extend the period of performance for thirty (30) days without additional consideration, provided that the Environmental Protection Agency will agree to the following terms:
>
> 1. EPA will negotiate to effect the award of a sole-source contract to the Maxima Corporation for word processing, editing, and other production related services at a level of effort consistent with the enclosed statement of work (Enclosure B). This contract will be a cost-plus-fixed-fee contract for a twelve (12) month period of performance and will include two (2), twelve (12) month option periods. The fixed fee for this agreement will not be less than 8% of the total estimated costs.
> 2. EPA will agree to approve and expeditiously process Maxima's invoice for all guaranteed minimum items under the current contract.
> 3. EPA will agree that production requirements for the thirty (30) day extension period will not exceed the requirements for the period August 2, 1982 through August 29, 1982 by more than 10%.
>
> The acceptance of these terms is essential to re-negotiation.

Beside each of the numbered paragraphs are handwritten notations with the initials "JK" for James Kranda, the contracting officer. Beside paragraph 1 is the word "agreed," beside paragraph 2 are the words "when received EPA will process," and beside paragraph 3 appear the words "understood qty did not exceed."

Under date of September 21, 1982, modification 1 to the existing contract was prepared deobligating $40,000 from fiscal year 1981/1982 and reobligating $40,000 of fiscal year 1982/1983 funds, and extending the period of performance for 1 month through October 31, 1982. By voucher dated October 31, 1982, Maxima billed EPA for the month of October 1982, in the amount of $272,210.90. This amount was calculated by deducting previous billings of $152,661.50 from the total of the contract minimum dollar amounts of $420,534 leaving a balance of $267,872.50. To this was added the October lease costs (not in issue) of $4,338.40. The voucher was forwarded by the EPA finance office to the project officer, who checked the box next to the words "Goods or services have been delivered as requested by the contract to support this payment." It appears that this was the regular payment procedure and that the contracting officer did not see or approve the voucher. The voucher was paid on or about December 20, 1982.

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In October 1983, the EPA Office of General Counsel learned that the voucher had been paid. By letter dated November 16, 1983, the EPA termination and claims contracting officer (successor to James Kranda) advised Maxima that EPA's failure to order the contract minimum quantities was a constructive termination of the contract for the convenience of the Government effective October 31, 1982, and requested Maxima to submit a termination settlement proposal in accordance with the termination clause by January 31, 1984. There has been no termination proposal submitted by Maxima. On May 31, 1984, the contracting officer issued a final decision demanding repayment to EPA of $233,974.05[1] after deducting estimated amounts for October 1982 equipment costs, production requirements, and termination expenses. Maxima appealed that final decision to this Board. EPA has requested this Board to order Maxima to submit a termination settlement proposal. Maxima counterclaims in an unspecified amount for the services performed in October 1982 plus interest thereon. EPA has moved to dismiss the counterclaim as premature because appellant did not submit the claim to the contracting officer for a final decision.

Appellant's motion is accompanied by an Appendix A entitled "Material Facts as to Which There is no Genuine Dispute" and contains a listing of 39 statements. Appellant argues that in lieu of exercising his right to terminate the contract for convenience, the contracting officer agreed to pay the guaranteed minimums in exchange for an added month of free services and a more favorable follow-on cost-reimbursement contract. It contends that the Government received additional consideration for the bargain it made and that it cannot now upset the consummated agreement by claiming the actions of the contracting officer were based on a mistake in law and were beyond the scope of his authority. In the Government's response, counsel addressed each of the "Material Facts" set out by appellant and showed specific disagreement, in whole or in part, with 18 of them. Most significant of these are the alleged material facts relating to consideration, or which appellant relies to underpin a new consummated agreement. Regarding Mr. Kranda's notations in the margin of the September 27, 1982, letter (statement 17), the Government contends the notations were not a confirmation of agreement to the three terms, but were added in the mid-to-late October 1982 timeframe, nor were they discussed with any EPA or Maxima employee before or after their entry. Regarding statement 22 that the October services of Maxima were provided without added consideration, both the affidavits of the contracting officer and the project officer support the view that EPA did not expect the October services to be provided free, but were to be billed at the contract unit prices. Additionally, the Government challenges the fact contentions that the contracting officer and project officer agreed to pay the

[1] Amount changed to $229,635.65 by amendment of Government's complaint to correct mathematical error.

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guaranteed minimums in return for the October services or the negotiation of a cost-reimbursement contract. This is supported by the oft-repeated assertion of the contracting officer and project officer that they had always believed EPA to be obligated to pay the guaranteed minimums to Maxima regardless of the quantities ordered. Therefore, we found that there were disputed material facts concerning the alleged consideration for the agreement under which Maxima claimed entitlement and was paid the guaranteed minimums under the contract.

The Government's motion is based on the following propositions: (1) The contracting officer had no express authority to pay Maxima the guaranteed minimum. The argument here rests heavily on the presence in the contract of a payments provision, the "guaranteed minimum" provision, and the "Termination" clause and the need to read them together to give effect to all the contract terms. The interpretation of the minimum payment regardless of the amount of work produced is said to be contrary to the payment provision permitting payment only for completed work and would render the termination provision meaningless because it would prevent the Government from invoking it in the event minimum orders did not occur. The Government contends the contract did not authorize payment of a guaranteed minimum, but that those words simply represent the buyer's promise to order a minimum quantity, the failure of which would result in payment pursuant to the termination clause if invoked by the contracting officer or by operation of law and (2) a contracting officer has no authority to make agreements which violate the Federal procurement regulations, including those requiring an audit prior to certain agreements, those which violate the termination clause and the implementing regulations, and those placing limitations on his authority.

The Government's extensive arguments and citations are severely truncated here for the reason that the issues have not been joined in the pleadings. Appellant seeks to prove a new agreement supported by consideration and consummated by payment, and has addressed only in passing the many cases cited respecting the contracting officer's authority and those dealing with constructive termination of indefinite quantity contracts. Appellant relies on cases dealing with the authority of the contracting officer to make unwise or improvident agreements, and the Government relies on cases of contract interpretation, limits on the contracting officer's authority, constructive terminations, and erroneous payments.

Discussion and Decision

In addition to a decision on the central question of law, the question of whether the termination clause of the contract can be asserted retroactively where guaranteed minimum quantities have not been

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ordered, the parties ask that the Board include in its decision an interpretation of the guaranteed minimum and payment provisions of this contract. As stated above, the parties did not join issue in the pleadings of this case, leaving much original research to the Board. That research has convinced the Board that there can be little value placed on any interpretative analysis of a guaranteed minimum contract that purports to bind the Government to order or pay for any minimum quantities. Since *College Point Boat Corp.* v. *United States*, 267 U.S. 12 (1925), the availability of the termination for convenience right of the Government to escape liability for breach of contract damages or other contractual commitments, even when asserted retroactively, has been expanded as a doctrine of federal procurement law. There Mr. Justice Brandeis stated:

> A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.

Thus, the right to retroactively assert the termination for convenience right was established long ago, in a case with striking similarities to the instant case. There, both parties were unaware of the availability of the termination option until long after the contract had been cancelled. Here, both parties mistakenly believed that the Government was liable to pay an amount equal to the cost of the guaranteed minimum quantities of services.

Later, in *John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381 (1963), *cert. denied*, 377 U.S. 931 (1964), the Court of Claims relied on *College Point* to extend the right of the Government to limit liability to the Termination provisions even though no action had been taken to invoke those provisions. Subsequently, the doctrine of constructive partial termination for convenience has been applied in many cases of requirements contracts and minimum quantity contracts where the Government failed to order all its requirements or the minimum quantity to limit the recovery to the compensation allowed under the terms of the termination clause. *See Manuals, Inc.*, ASBCA 24123, 80-2 BCA par. 14,579, at 71,882. It is clear from the precedents that the availability of the right to terminate for convenience, even though untimely asserted or not asserted at all, limits the liability of the Government to costs recoverable under the termination clause.

In the instant case, we are confronted with appellant's assertions that the contracting officer knowingly considered terminating the contract, chose not to do so, and entered into a new agreement for which there was consideration; thereby, preventing a constructive termination or an untimely act of termination by the Government after completion of the contract. We note that appellant's letter of September 27, 1982, agreed to a 30-day extension of the contract "without additional consideration" on condition that EPA will negotiate a follow-on contract with Maxima on a cost-plus-fixed-fee

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basis, that EPA would pay the invoice for the guaranteed minimum quantities, and that EPA would limit the services required during the 30-day extension.

In stating that the extension was agreed to "without additional consideration," appellant was relying on being paid for services rendered during the 30-day extension from funds already obligated on the contract. Both appellant and the contracting officer were ignorant of the fact that the Government was liable only for termination costs for the failure to order the minimum quantities. By agreeing that the 30-day extension was without additional consideration, appellant merely allowed the contract performance period to be extended. There were no amendments to the contract agreement, and therefore, the terms during the 30-day extension were the same as they were during the previous 12 months. The Government would order services during the extended period and pay for those services on acceptance. There was no new agreement, but simply an extension of the existing contract, expressly without consideration.

The first condition expressed in the letter was that a sole-source contract be negotiated with Maxima on a cost-plus-fixed-fee basis. EPA had asked Maxima for its cost-reimbursable proposal for a new contract, which was provided by letter dated September 13, 1982. Stating this condition repeated EPA's intentions, that had already been communicated to Maxima, that EPA desired to contract with Maxima for continuing the services on a cost-reimbursable basis. The 30-day extension, given without consideration, was for the purpose of avoiding interruption of securing the services. The condition that a new CPFF contract be negotiated with Maxima related to EPA's expressed intentions, Maxima's proposal of September 13, and the prospective new CPFF contract. It did not relate to the existing contract, and we find no consideration for any new agreement in this condition.

The second condition of the agreement to pay an invoice for all guaranteed minimum items expressed the mutually held mistaken belief of the parties that the Government was liable for payment for the guaranteed minimum quantities. Under existing judicial determinations, no such liability existed. *See United States* v. *Amdahl Corp.*, No. 85-2760 (CAFC Mar. 6, 1986). There, the court cites, with approval, a law journal article dealing with the limits placed on the authority of Government agents to act by statute, regulation, and judicial and administrative determinations. The cases discussed *supra* clearly limit the Governments liability for failure to order contract minimums, and it would follow that the case law also limited the authority of the contracting officer to make payments for services not rendered and for which there is no liability. Whether the contracting officer agreed with this second condition or not is of no consequence. He had no authority to do so and could not bind the Government to

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make such payments. Appellant is charged with knowledge of the longstanding judicial restrictions of the Government's liability in minimum quantity contracts, and could not rely on the contracting officer's unauthorized promise to make payments for which the Government was not liable. The unauthorized promise of the contracting officer to do so cannot be found to be consideration.

The third condition restricting production requirements during the 30-day extension period to no more than 10 percent over the production requirements for August 1982, relates to the existing contract. James Kranda's notation beside this condition of "understood qty did not exceed" is in the past tense, indicating that the work requirements for October had been completed when the notation was made. This is also supportive of the Government's position that the notes placed on the letter were written sometime after the extended contract had been completed. In any case, the limitation on the production requirements during the 30-day extension did not benefit the Government, but rather protected appellant from requirements that might exceed appellant's capacity to perform. We find no consideration for any new agreement in this condition.

Having found there was no new agreement, nor any consideration for one, we conclude that the contracting officer was without authority to agree to pay for the unordered production requirements under the contract. The payment of the invoice was unauthorized and therefore mistaken. Such funds paid under a mistake of law must be refunded. *DiSilvestro* v. *United States*, 405 F.2d 150 (2d Cir. 1968), *cert. denied*, 296 U.S. 964 (1969). In the circumstances of this case, and based on the authorities cited, we conclude that the original contract was constructively terminated for the convenience of the Government on October 31, 1982.[2]

Appellant's counterclaim for compensation in an unspecified amount for services for the month of October 1982 is subsumed in our quantum determination which is predicated on the Government's computation based on the sound standard of services not exceeding the August 1982 requirements, a known quantity. Clause 12 of the contract provides that the contractor's termination claim shall be submitted within 1 year after the effective date of termination, and thereafter for the unilateral determination of the amount owing the contractor by the contracting officer. We see no useful purpose in remanding this long-standing dispute for negotiation of the termination settlement.

The appeal is denied. Maxima has refused to provide its termination settlement proposal. The Government computed an amount by allowing $32,236.85 for the October requirements ordered, $4,338.40 for October equipment costs, and $6,000 for termination settlement expenses. This reduces the overpayment to $229,635.65, which Maxima

[2] The effect of the case law is to avoid any guarantees concerning minimum quantities promised by the Government by the operation of the termination rights. We note that some agencies have undertaken to warn contractors in the contract that failure to order minimum quantities will result in payment in accordance with the termination clause. This practice should be encouraged to avoid misleading contractors with unenforceable promises.

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is hereby ordered to repay to the Government, together with interest computed pursuant to P.L. 92-41 (85 Stat. 97) (Clause 34 of the contract) from May 31, 1984, the date of the final decision demanding repayment.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

WILLIAM PERLMAN

91 IBLA 208 Decided *April 2, 1986*

Appeal from a decision of the Acting Director, Colorado State Office, Bureau of Land Management, affirming assessments for noncompliance with oil and gas lease operating regulations. MOO-C-1420-1521, MOO-C-1420-1530.

Affirmed as modified.

1. Bureau of Land Management--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

2. Bureau of Land Management--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

3. Bureau of Land Management--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR Subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

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4. Estoppel

Where an oil and gas operator obtains oral permission to do preliminary work at a drilling site for which an application for permit to drill is pending, and then begins drilling without written permission to do so in violation of Departmental regulation, there is no factual basis for finding an estoppel of the Government which would prevent assessment of a penalty for unauthorized drilling operations.

APPEARANCES: Julia Hook, Esq., Denver, Colorado, and John F. Shepard, Esq., Washington, D.C., for appellant; William R. Murray, Esq., and Linda C. Breland, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Following a Bureau of Land Management (BLM) review hearing on January 12, 1984, William Perlman was assessed penalties in the amount of $28,750 by the Acting Colorado State Director, BLM, for the conduct of oil and gas drilling operations on four wells located on Indian lands. Penalties were assessed for three Perlman wells, 17-1, 17-2, and 20-1B, located on lease No. MOO-C-1420-1521. These penalties were assessed against drilling operations commenced prior to BLM approval of Perlman's applications to drill for each of the three wells. In the case of the fourth well (number 1-33), located on lease No. MOO-C-1420-1530, Perlman was assessed penalties for making unapproved plug-backs[1] and well recompletions into the Mesaverde and Fruitland geologic formations.

Perlman was properly authorized to complete well 1-33 to the Dakota formation, and did so.[2] When exploration of the Dakota formation failed to produce favorable results, the well was plugged at the Dakota level, and higher strata, (the Mesaverde and Fruitland formations) which were penetrated by the drill hole, were tested. This plugging back was undertaken, however, without notice to Minerals Management Service (MMS), the agency then responsible for management of the lease.[3]

As to the three wells drilled prior to receipt of written approval (17-1, 17-2, and 20-1B), Perlman contends he had obtained oral permission to commence operations which should estop the Department's attempt to assess penalties for having commenced drilling at these wells. He also contends, even assuming his commencement of operations was not proper, the penalty assessed was improper.

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[1] "Plug-back" is defined by the Bureau of Mines *A Dictionary of Mining, Mineral, and Related Terms* (1968) as: "To cement off lower section of casing; to block fluids below from rising in casing to a higher section being tested."

[2] It appears this well site had been staked upon an oral approval of the location. (*See* Exh. D to Appellant's Reply Brief).

[3] The supervising agency has twice been changed. On Jan. 19, 1982, the Secretary of the Interior transferred administration of Indian oil and gas lease operations from the Conservation Division, U.S. Geological Survey, to the newly created MMS. Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982). On Dec. 3, 1982, and Feb. 7, 1983, the administrative function was again transferred, this time to BLM. Secretarial Order No. 3087, *as amended* 48 FR 8982, 8983 (Mar. 2, 1983).

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As to well 1-33, Perlman contends the penalty is excessive. He also argues the penalty sought is erroneously computed on the assumption the unauthorized exploration of the Mesaverde and Fruitland were continuing violations of Departmental regulations which took place between February 17 and June 3, 1982. Perlman also contends oral permission to explore the higher strata at well 1-33 was given by an officer of the Department, and that, in any case, those operations conducted between February 17 and June 3, 1982, cannot reasonably be considered to be of a continuing nature.[4]

At a January 12, 1984, BLM review hearing conducted pursuant to 25 CFR 211.22 evidence was presented regarding all four alleged violations. Testimony by Perlman's landman established that well 1-33 was drilled into the Dakota formation, which formation, consisting of "tight sands," was perforated at depths of from 7,880 to 7,870 feet on February 17, 1982 (Tr. 12). The well was then plugged back to the Mesaverde formation, and, on February 23, 1982, perforation was made in the Mesaverde formation at the 5,850-foot level, again in "tight sands," (Tr. 13). This drilling technique, which involves initial fracture at the deepest formation followed by perforations at successively higher levels, is said by Perlman to be part of a patented process he developed for exploration of tight-sand formations (Tr. 13). On April 15, 1982, a second perforation of the Mesaverde formation was made at 5,584 to 5,592 feet (Tr. 13). Finally, on June 3, 1982, there was a recompletion of well 1-33 in the Fruitland formation, the highest formation explored (Tr. 14). The approved application for permit to drill allowed completion (in this case fracturing) of well 1-33 only at the lowest level, in the Dakota formation (Tr. 9). The subsequent plugging-back and fracturing of the higher strata encountered in well 1-33 was not approved in advance by BLM (Tr. 9). To perform the unauthorized work, a "workover rig" operated at the well for approximately 3 to 4 days in February 1982, 1 day in April 1982, and 3 days in June 1982 (Tr. 16). All the work required to plug-back to, perforate and explore the Mesaverde and Fruitland formations was conducted during those days, for an actual working time of about 8 days (Tr. 16). Following the review hearing, Perlman amended the testimony concerning unauthorized drilling work to conform to documented work performance; the drilling record indicates 13 days were spent on recompletions of well 1-33. The penalty originally assessed for the unauthorized work done on well 1-33 was $16,000; the BLM review panel affirmed this assessment.

In the case of wells 17-1, 17-2, and 20-1B, on Southern Ute Tribal Lease No. MOO-C-1420-1521, penalties were assessed in the aggregate sum of $12,750 for commencement of drilling prior to approval of

[4] Appellant requested oral argument. The Board, however, finds the record on appeal is sufficiently developed to permit decision, and concludes oral argument is unnecessary.

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Perlman's application for permit to drill (Tr. 17). Applications for drilling permits for all three wells were filed on September 1, 1982. In the case of well 17-1, preliminary site preparatory work was begun by the operator on September 15, 1982 (Tr. 18). The well was spudded on September 22, 1982. Perlman's application for permit to drill was approved on September 30, 1982. Drilling this well required 6 days (Tr. 18).

Site preparation for well 17-2 was begun on September 16, 1982, and the well was spudded on September 28, 1982 (Tr. 18). On October 1, 1982, Perlman's application for permit to drill 17-2 was approved. This well also required 6 days to drill. Road construction and drill-site preparation by Perlman was commenced for well 20-1B on September 13, 1982, the well was spudded on September 18, 1982, and Perlman's application for permit to drill was approved on October 1, 1982 (Tr. 18). Drilling took 6 days.

Appellant was assessed penalties for violations at well site 17-1 at the rate of $250 per day for 15 days for a total penalty of $4,000 (Tr. 19). For well 17-2 appellant was assessed $250 per day for 15 days, or a total penalty in the sum of $4,000 (Tr. 19). For well 20-1B, appellant was assessed $250 per day for 18 days, totaling $4,750 (Tr. 19).

Perlman contends BLM gave oral permission to commence drilling at all four wells and that recompletion at various levels in the case of well 1-33, was begun in the belief that it had been authorized (Tr. 26). Oral permission to commence work was said to have been given to Perlman employee Duke Fennewald by Tim Barrett of the Bureau of Indian Affairs (BIA), Don Englishman of MMS, and Brian Reid, a representative of the tribe (Tr. 29-30). BLM, however, denied that oral approval for commencement of drilling was ever given, while admitting some communication between Departmental employees and Perlman employees did take place concerning well operations (Tr. 31). The BLM review panel permitted the later filing of an affidavit concerning this issue executed by Perlman employee Fennewald, which was received by BLM on January 18, 1984. The Fennewald affidavit recites that on September 13, 1982, Don Englishman gave Fennewald oral permission to proceed with drilling operations on wells 17-1, 17-2, and 20-1B (Fennewald Affidavit at 2). The Fennewald affidavit describes a conversation which took place at the well-site inspections for wells 17-1, 17-2, and 20-1B between Fennewald and Englishman at which Barrett and Reid were present, when Englishman outlined additional or changed requirements needed before drilling could begin (Fennewald Affidavit at 1, 2). The affidavit concludes: "He [Englishman] told me [Fennewald] * * * Perlman could proceed with drilling operations * * *" (Fennewald Affidavit at 2). Fennewald also observes that staking of several well sites was done with oral permission where changes in site location were made (Fennewald Affidavit at 2). The record further indicates staking for well 1-33 and other Perlman wells was in fact done in reliance upon oral approval (Exh. D to Appellant's Reply).

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Subsequent to the filing of the Fennewald affidavit by Perlman, BLM also supplemented the record with an affidavit by Frank Salwerowicz, a member of the BLM review panel (BLM Response to Appellant's Reply Brief at 2). This document offers a definition of the expression "dirt work" which was used at the review hearing to describe preliminary operations at the four Perlman drill sites. The Salwerowicz affidavit offers an explanation of this term as it relates to the drilling of an oil well, ostensibly for the purpose of clarifying the record:

> 3. In my experience, oral approvals are given for the commencement of "dirt work" when time is a critical factor to the lessee or operator. "Dirt work," however, is limited to road construction and site preparation. "Dirt work" does not include drilling operations.
>
> 4. Oral approval for dirt work, if warranted by the circumstances, is only given after the application for permit to drill has been completely reviewed and when written approval of the permit will be issued shortly.
>
> 5. Operations conducted pursuant to an oral approval for dirt work must stop short of "spudding in" the well, that is, the first boring of the hole for the well.

(Salwerowicz Affidavit at 2.)

Review of the hearing transcript and the parties' briefs on appeal indicates Perlman has indeed attempted to equate permission to begin preliminary work such as staking, road construction, and site preparation, with permission to do the actual drilling of the wells, which involves spudding the well, drilling, plugging off unproductive levels, and making recompletions at new, unexplored levels. Perlman argues this approach is reasonable and should be accepted as a matter of logic; that is, permission to begin work for any purpose associated with drilling should be treated as approval to proceed with drilling itself. *See, e.g.*, Letter dated Jan. 18, 1984, Hook to Moore at 3, transmitting documents to supplement the record. This analysis is not, however, as logical or compelling as Perlman would make it appear. If, as the Salwerowicz affidavit explains, permission to begin preliminary work does not lead ineluctably to permission to drill, the only possible point to Perlman's argument on this point must be that the time spent on preliminary work or "dirt work" should not be considered part of the time spent drilling when calculating the number of days during which unauthorized operations took place at the various drill sites. That is, assuming "drilling" cannot be equated to all operations conducted at the drill site, the period of unauthorized drilling should not include time spent in preparatory work.

Certainly, this logic was applied by BLM in the case of well 1-33. Preliminary oral permission for initial work on well 1-33 was apparently obtained. Significantly, however, prior written permission to commence drilling well 1-33 was obtained before actual drilling began. The well was spudded only *after* written permission to drill was given. Well 1-33 was drilled before wells 17-1, 17-2, and 20-1B. All circumstances considered, if Perlman could reasonably have

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interpreted oral permission to begin work to encompass drilling, in addition to work preparatory to drilling, there should be a showing on the record such a belief was reasonable. The record on this point is ambiguous. Had Perlman acted in reliance upon his past dealings with the agency, *i.e.*, the drilling of well 1-33, it would be reasonable to assume prior written permission was necessary before spudding wells 17-1, 17-2, and 20-1B, since he did not commence drilling at well 1-33 before written permission was issued. His argument in this respect is therefore inconsistent with his prior conduct.

[1] On appeal, Perlman contends each act of unauthorized drilling is a single discrete act, which merits only a single $25 penalty under 30 CFR 221.54(c), (d) (1982), for a total cost to Perlman of $100 instead of $28,750. Perlman ignores the distinctions between the BIA rule codified at 25 CFR 211.22, which requires a penalty imposition, the former MMS regulations appearing at 30 CFR Subpart 221 (1982), which imposed punitive measures for rule violations treated as civil penalties, and newer regulations published at 43 CFR Part 3163 which, in part, purport to assess liquidated damages based upon injury to the leasehold. Perlman challenges the BLM determination which finds action properly could be taken to regulate drilling on these Indian leases both under BIA rules in effect in 1982 at 25 CFR Part 211, and by MMS, at 30 CFR Part 221 (1982). In this connection, it should be observed Perlman's lease specifically incorporates the provisions of 30 CFR Part 221 and "all regulations * * * in force." *See* Lease MOO-C-1420-1521, paragraph 5(g).

The record on appeal indicates there have been prior instances of enforcement of the Indian leasing (or BIA) regulation which were relied upon by BLM when determining provisions of 25 CFR 211.22 controlled decision of these four lease violations. *See* Memorandum to District Manager from Petroleum Engineer dated Sept. 30, 1983, subject: *Appeal of Assessment for Noncompliance*. In this case Perlman was twice given actual notice that the penalties provided by 25 CFR 211.22 would be applied against violations of regulations at his drilling operation. First, the lease provisions gave notice of this fact. Second, Perlman was provided with notice and a hearing concerning the four violations at issue; assessments for the violations were made and notice given to Perlman of the reasons for the assessments on August 23, 1983. At the hearing conducted on January 12, 1984, Perlman, represented by counsel, presented witnesses and argument. A verbatim transcript of the hearing was prepared. Subsequently, Perlman was allowed to supplement the record on appeal and brief the issues presented. The fact violations took place as claimed by BLM is not challenged by Perlman. Nor are the unauthorized drilling starts denied. While Perlman seeks to excuse them as having been orally approved, it is clear they occurred. The principal issue on appeal therefore concerns the proper amount of the penalty assessment, and, as a subsidiary issue, the characterization of the assessment itself–whether it is "penal" or "civil."

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The reason for Perlman's objection to the application of 25 CFR 211.22 is practical, since 25 CFR 211.22 provides for penalties not to exceed $500 "for each and every day the terms of the lease, the regulations, or * * * [the supervisor's] * * * orders are violated." The operating regulations developed by MMS, however, which appeared at 30 CFR 221.54(c), (d) (1982), provided for single penalties of $25 for each violation. It is clear that past Departmental practice was to apply the Indian leasing rules in cases involving Indian land leases. *See* Memorandum dated September 29, 1983, from Petroleum Engineer to District Manager, Montrose.

The general operating regulations appearing at 30 CFR Part 221 have since been revised, and now appear at 43 CFR Part 3160. *See* 48 FR 36583 (Aug. 13, 1983). As amended in 1983, the general operating regulations provided for increased charges for noncompliance, now denominated "assessments." The rationale for these charges under the revised regulations was changed: certain violations of the regulations were considered to be in the nature of damages to the lessor for which the assessments were a form of compensation akin to damages. *See* 43 CFR 3163.3. Under the revised rules, drilling irregularities, involving either premature starts without written approval or departures from approved written permits, merit assessments of $250 instead of $25 as was formerly true. Further, these assessments could now, under the revised regulation, be cumulated for each day of violation. 43 CFR 3163.3 (1983). A 1984 amendment of this rule, however, eliminated the provision permitting cumulation of assessments for successive days of the same violation. 49 FR 37365 (Sept. 21, 1984) (and *see* Proposed Rulemaking at 51 FR 3882, 3885 (Jan. 30, 1986), providing for a uniform imposition of assessments and penalties for oil and gas operations application of these operating regulations was partially suspended on March 22, 1985. 50 FR 11517.

Perlman does not seek to obtain the benefit of the later promulgated rules which establish the current (and now suspended) regulatory scheme, but argues, simply, that the general oil and gas lease operating rules in effect in 1982, as published at 30 CFR Part 221, should control his conduct occurring in 1982. He further contends the penalty provisions of the BIA regulations published at 25 CFR 211.22 do not apply to him because they were not violated by his conduct in this case. Perlman argues that, until November 26, 1982, there was no specific BIA regulatory provision requiring a lessee to submit an application for permit to drill, and that therefore drilling begun without written permission was a violation of the MMS operating regulation codified at 30 CFR 221.21(b), which forbids drilling, redrilling, or plug-back operations without written approval.

The issue framed by these arguments concerns which regulations are to be applied, the MMS regulations at 30 CFR Part 221 or the BIA regulation at 25 CFR Part 211. There is a customary rule of statutory

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construction which dictates that, where there are two acts which contain conflicting provisions, the specific act controls over the general act. A similar construction logically also applies in the case where conflicting or duplicative regulations must be construed. *See generally* Davis, *Administrative Law Treatise* § 30.12 (1958).

As between the BIA oil and gas operating rules and MMS's general operating rules in effect at the time of these leases, the BIA rule at 25 CFR 211.22 specifically requires its provisions be given primary effect so far as concerns impositions of penalties for noncompliance. Thus, the BIA regulation preempts the oil and gas lease operating penalty provisions of any other Departmental regulation, providing:

> Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative [officers of the BIA] or of the orders of the supervisor or his representative, (sic) shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided*, That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

25 CFR 211.22. The quoted regulation is promulgated to implement the Act of May 11, 1938, 52 Stat. 348, the Indian Mineral Leasing Act, which authorized leasing on Indian lands (25 U.S.C. § 396d (1982)). This statute also provides that the Secretary shall promulgate rules respecting oil and gas operations on Indian lands. The provisions of 25 CFR 211.22 implement the Act; they therefore are specific rules promulgated to control the leasing of Indian lands, and control over the general operating rules which apply generally to all leased lands administered by the Department. When Perlman agreed to lease these Indian lands he accepted, as part of his lease, the provisions of 25 CFR 211.22, providing for penalties for failure to comply with lease terms. Having agreed to the lease terms, he cannot now avoid application of these rules.

Appellant also argues in the event 25 CFR 211.22 should be held to apply, that the regulation is impermissible as a penal rule not authorized by law. The authority of the Secretary to administer and to cancel leases of Indian lands in his discretion pursuant to provision of 25 CFR 211.22 in the event of breach of the lease terms is, however, established in law. *See Yavapai-Prescott Indian Tribe* v. *Watt*, 707 F.2d 1072 (9th Cir. 1983); *Sessions, Inc.* v. *Morton*, 491 F.2d 854 (9th Cir. 1974). Since the unauthorized drilling, which undoubtedly took place, constituted a breach of the lease terms, cancellation was a possibility here both as an alternative to imposition of the penalty provisions of 25 CFR 211.22 or as an additional sanction. *See* 25 CFR 211.27. The provision of 25 CFR 211.22 authorizing a daily assessment of up to $500 was invoked instead, but was further mitigated to recognize

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Perlman's violations were not considered extreme. As a result Perlman was penalized at the rate of $250 per day for the number of days during which the violation was found to persist.

Current Departmental policy concerning administrative sanctions for oil and gas operating violations is in flux;[5] while the BIA regulation at 25 CFR 211.22 establishes a ceiling in the amount of $500 and speaks in terms of "penalties" for breach of lease terms, it is clear the Departmental policy expressed in the regulation requires the exercise of a degree of discretion in fixing sanctions for violations of operating rules by a lessee on Indian lands. The regulation provides for "a penalty of not more than $500 per day." As appellant points out, the BIA regulations appearing at 25 CFR Part 211 are silent concerning exactly how this charge is to be calculated. The fixing of the penalty, from zero to $500, is therefore committed wholly to agency discretion. It is within this context that Perlman complains, first, he was assessed too much for the conduct which he admits took place, and second, that the assessment was a civil penalty imposed pursuant to a regulation which lacks underlying statutory authority for the imposition of such a penalty. To support his position, he cites *Gold Kist, Inc.* v. *U.S. Department of Agriculture*, 741 F.2d 344 (11th Cir. 1985).

Gold Kist involved the marketing of peanuts under regulations imposed by the Secretary of Agriculture. Although the 1938 statutory authority for the regulation of peanut marketing which was involved in *Gold Kist* did not provide specifically for the imposition of civil penalties, the Secretary of Agriculture had nonetheless imposed civil penalties under regulations implementing the statute. The *Gold Kist* court found two conflicting positions co-existed in the law on the subject, some authorities permitting imposition of penalties under an agency's general rulemaking authority, the other requiring specific authority for imposition of penalties in the implemented Act. *Id.* at 347, 348. The *Gold Kist* opinion cut through this Gordian knot, stating:

> To resolve these conflicting lines of precedent we hold that the statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty but that an agency has broad administrative powers to impose administrative sanctions that are not penalties as long as the sanctions are reasonably related to the purpose of the enabling statute. " 'Penal' means punishable; inflicting a punishment; constituting a penalty; or relating to a penalty." Black's Law Dictionary 1289 (4th ed. 1957). The dictionary also defines "penal laws" as "[t]hose which prohibit an act and impose a penalty for the commission of it....Strictly and properly speaking, a penal law is one imposing a penalty or punishment (and properly a pecuniary fine or mulct) for some offense of a public nature or wrong committed against the state...." *Id.* at 1290 (citations

[5] *See* 43 CFR Part 3160. Prior to partial suspension of the regulations governing assessments for noncompliance on Mar. 22, 1985 (*see* 50 FR 11517) the Department issued Instruction Memorandum No. 84-594, Change 3 (Jan. 4, 1985), establishing a maximum assessment or "cap" for assessments involving on-shore Federal and Indian oil and gas lease operations. Change 4 to this Instruction Memorandum issued Apr. 16, 1985, further limited assessments for offenses said to be continuing in nature. *See also* proposed rulemaking at 51 FR 3882, *supra*.

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omitted). We conclude the fines imposed on Gold Kist were penalties, not administrative sanctions.

Id. at 348.

As *Gold Kist* indicates, however, there is no unanimity in court decisions considering the power of agencies to impose administrative civil money penalties. *See, e.g., Commissioner* v. *Acker*, 361 U.S. 87, 94 (1959), holding a penalty provided by a tax regulation invalid as an "attempted addition to the statute of something which is not there" in a case where the tax statute did not specifically provide for penalty imposition. In contrast, in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973), the Court, finding a credit regulation providing for penalties to be valid, opined the penalty regulation was a reasonable exercise of administrative authority although penalties were nowhere provided for by the Truth in Lending Act, the implemented statute in that case. In the third case cited by the *Gold Kist* opinion, *West* v. *Bergland*, 611 F.2d 710 (8th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980), a regulation permitting the Secretary of Agriculture to impose an administrative penalty by withdrawing meat-grading services was approved even though the Court considered the regulation to be penal in nature, and despite the fact the implemented statute did not specifically require such a penalty provision.

These cases, and the *Gold Kist* case itself, illustrate there is no set formula for determining whether an administrative civil-money penalty is properly imposed by regulation. The cases decide each situation on its own merits, as is illustrated by the *Acker* case, where the Court's opinion characterized the disfavored penalty provision as an attempt to impose a double penalty for the same conduct already punished by a provision of the tax code. *See* 361 U.S. at 93.

The regulation under attack in this appeal, 25 CFR 211.22, is part of a comprehensive plan for development of Indian minerals put into motion by the provisions of 25 U.S.C. §§ 396a-396g. This plan is described in *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104 (9th Cir. 1981):

> The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.
>
> The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, *penalties for failure to comply with the terms of leases*, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or the Department of Interior officials, and cancellation of

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leases. 25 C.F.R. §§ 171.1-.30 (1980); *see also* 25 C.F.R. §§ 173.1-.29 (1980) (Italics supplied.)

(650 F.2d 1112, fn.9). Consistent with the quoted analysis, in *United States* v. *Forbes*, 36 F. Supp 131 (D. Mont 1940), *aff'd* 125 F.2d 404 (9th Cir. 1942), *aff'd* 127 F.2d 862 (1942) the imposition of administrative penalties by the Department was approved as a necessary and reasonable exercise of the power of the Secretary exercised incident to mineral leasing under the Mineral Leasing Act of 1920. It is concluded, therefore, the regulation attacked by Perlman, 25 CFR 211.22, was duly promulgated under the authority of the Indian Mineral Leasing Act, and properly provides for penalties for violation of rules implementing the Act. This Board has often observed it lacks the authority to declare invalid such a duly promulgated regulation of the Department. *See, e.g., Ahtna, Inc.*, 87 IBLA 283 (1985).

The record establishes Perlman was in fact authorized to begin the preliminary "dirt work" for wells 17-1, 17-2, and 20-1B. Preliminary staking notices for wells 17-1, 17-2 and 20-1B were signed in August 1982. An onsite inspection of the well sites was held on September 1, 1982. Tr. 30, 31; Fennewald affidavit at 1, 2. The Salwerowicz affidavit submitted by BLM in response to the Fennewald statement admits oral approval for preliminary dirt work was given by BLM employees in the case of well 1-33, on June 2, 1981, substantiating Perlman's claim that such a practice was customary under certain circumstances. Salwerowicz affidavit at 2, 3.[6] Since, according to Salwerowicz, such permission is given only when written approval of a permit to drill is imminent, the fact that the written approval of the applications for permits to drill wells 17-1, 17-2, and 20-1B was issued less than 20 days after the alleged oral approval for dirt work was said to have been given, gives further credence to the claim that oral approval for dirt work was in fact given. Despite this fact, however, the penalty review panel charged Perlman with a penalty from the date preliminary dirt work began, rather than from the times when unauthorized drilling commenced. The record, as previously summarized, establishes that, for well 17-1, there were 6 days of actual unauthorized drilling prior to issuance of a written permit to drill; for well 17-2, 3 days; and for well 20-1B, 6 days, for a total of 15 days. On well 1-33, unauthorized recompletion or plug-back operations occurred over a period of 13 days.

The BLM review panel apparently calculating all operations, rather than only those operations concerned with drilling without written

[6] According to the dissent, Departmental policy regards surface disturbance without prior written approval to be a serious violation. It is apparent, however, that in Colorado at any rate, the policy was not quite so strict as the dissent believes. At no place in the record is there any mention that the oral approval for work on 1-33 was considered to be a breach of Departmental policy by any Departmental employee. On the contrary, it appears to have been a recognized practice. *See* Salwerowicz Affidavit at 2.

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permission for operations, assessed a penalty for 64 days of continuing violation (Tr. 7). The well log for well 1-33, however, considered with the testimony at hearing and the supplemental material received following hearing, indicates an overstatement of the time actually spent in unauthorized recompletions. The testimony of Perlman's landman, based upon the well log reports, was to the effect that, following initial completion of the well, (which was made with written approval), recompletions without written authorization occurred during a much shorter period (Tr. 14). The well logs indicate actual time spent upon recompletion at 1-33 to be 13 days rather than 64 days, as found by the review panel. This figure, 13 days, is arrived at by counting the number of days actually spent in recompletion activity. This figure does not include days during which no work was done, nor does it continue to assess a penalty for periods between recompletion activity at the various levels, since only unauthorized "operations" are forbidden. *See* 25 CFR 211.20(b).[7] This Board therefore finds Perlman conducted unauthorized operations on all four wells for a total of 28 days. The penalty for these violations, computed at $250 per day (the figure arrived at by the review panel), totals $7,000, rather than $28,750.

[2] While the number of days of violation was overestimated by including other preparatory work under the "drilling" category, the basis for the computation of penalty at $250 per day remains to be considered. The review panel justified its finding concerning the amount of the penalty assessed in the case of well 1-33, stating:

> The maximum assessment that can be levied under 25 CFR 211.22 is lease cancellation or a penalty of not more than $500 per day for each and every day the terms of the lease or the regulations are violated; or both such penalty and cancellation. Since the operating practices were proper for tight sands, and since the initial assessment was set at $250 per day rather than $500 per day, we believe that appropriate discretion was shown in establishing the amount of the assessment.

Panel decision dated January 26, 1984, at 2. Similar logic was applied by the panel in computing the penalty amount and quite clearly, the intention of the panel was to mitigate the penalty to half its potential severity as an exercise of agency discretion. This decision was based upon consideration of the effect of Perlman's operation upon the leasehold, and allowed leniency for the fact the operator had used appropriate drilling techniques.

In an elaborate 1979 case study of agency penalty procedure, the Administrative Conference of the United States arrived at recommendations for civil money penalty administration. *See Recommendation of the Administrative Conference of the United States* (RACUS) (GPO 1979). Concluding that considerations of due process require a hearing in penalty cases, the conference recommended standards be established for the determination of the amount of

[7] If, for example, on Sept. 13, 1982, well 20-1B had been spudded and Perlman then notified the driller to stop work because a permit to drill had not issued, Perlman should be liable for 1 day rather than for the 17 days which elapsed between the 13th and the issuance of a permit on October 1.

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penalty to be levied. Recommending the use of penalty formulas as helpful to such determinations the conference opined that:

> Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should be utilized.

Recommendation 79-3: Agency Assessment and Mitigation of Civil Money Penalties. RACUS at 24-25. Quite clearly, in this case, similar considerations entered into the decisionmaking by the review panel, and were part of the rationale for the ultimate penalty assessed.

When it determined mitigation of the penalty was appropriate, the review panel indicated that consideration of the absence of property damage and other circumstantial concerns were taken in account in setting the amount of the penalty to be assessed. The review panel also found "[t]he determination to apply assessments for the total period of noncompliance rather than as a single date violation is consistent with both past and present practices" (Review Decision at 3). The review panel cites 30 CFR Part 221 as support for this proposition. This reasoning is incorrect, since general Departmental regulatory policy since 1984 has clearly been otherwise. *See* 43 CFR 3163.3 (1984). And *see also* Instruction Memorandum No. 84-594, Change 4, declaring an end to the collection of charges for successive days of noncompliance with leasing regulations. The conclusion reached, however, is correct, since the controlling regulation here applicable, 25 CFR 211.22, leaves the agency no discretion but requires that the penalty imposed (which *is* subject to agency discretion) shall apply to "each and every day the terms of the lease, the regulations, or [the superintendent's] orders are violated." 25 CFR 211.22. Here, therefore, the review panel correctly assessed a penalty for successive days of operation.

[3] So far as concerns the fixing of the penalty assessment at $250 for each day of drilling operation at each well, we find the review panel and District Director arrived at this amount by mitigation by 50 percent of the maximum penalty which could have been assessed. This mitigation considered Perlman's overall conduct of the drilling operation. It was also a recognition he had violated the Department's regulations requiring written permission to drill, which could have resulted in serious damage to the leasehold and to the Indian lessor. The Board finds, therefore, that under the circumstances, no further reduction in the penalty amount is warranted. So much of the decision as provides for assessment of civil penalty in the amount of $250 per day for each violation is, therefore, affirmed. The total amount due from appellant, as so computed, is $7,000; the penalty is reduced accordingly.

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In connection with the calculation of penalty for successive days of operation, it should be observed, in calculating the appropriate penalty for the recompletion operation at well 1-33, that even were the total period of 64 days of "continuing" violation as calculated by the BLM review panel to be accepted as a basis for calculating penalty, it would not be possible to penalize equally days during which recompletion operations were under way and days when plug-back activity had halted. Quite clearly, in the case of 1-33, Perlman could have stopped at any formation explored by him, and need not have gone forward with successive plug-backs at different levels. Presumably, had he been notified his activity was unauthorized prior to completion of the last and highest level, he would have stopped work. Since his lack of prohibited activity between plug-backs could itself have caused no damage, the Board finds that, even assuming a violation during those days of inactivity, no penalty should be assessed for those days in which no activity took place, considering all the factors just described.* Similar reasoning would apply in the case of wells 17-1, 17-2, and 20-1B; no penalty at all should be assessed for orally permitted operations or for periods of inactivity. The result reached, therefore, would be the same in either case as is reached by finding only days of actual operation to be violations of the applicable regulation.

[4] When considering Perlman's estoppel argument, that the Government should not be allowed to penalize conduct which it allowed to occur, it must be kept in mind that, although often changed, the Department's Indian mineral leasing regulations have consistently required written approval prior to commencement of drilling. *See, e.g.*, 25 CFR 211.21, previously codified at 25 CFR 171.21 (1981). To invoke estoppel against the Government, four factors must be present: There must be (1) full knowledge of all relevant facts by the Government official who (2) intends his affirmative misrepresentation or concealment of a material fact will be acted upon under circumstances which entitle the party asserting estoppel to believe the misrepresentations, (3) the party asserting the estoppel must be ignorant of the true facts, and (4) he must rely upon the representation as made by the official. *See United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). This case discloses no evidence of affirmative misconduct by a Federal employee. Further, assuming permission to begin preliminary work could be considered to amount to an affirmative misrepresentation or concealment of the regulatory requirement that written permission to drill was required, because Departmental regulation provides such permission must be obtained in writing, failure to do so could not be excused so easily. Valid regulations may not be avoided by reliance upon claimed lax, uneven, or mistaken administration by governmental employees, since all persons are presumed to know of

* Had his drilling resulted in environmental damage Pearlman would also have been subject to penalties for violation of other provisions of the lease. The amount would, in such case, be based upon the number of days the environmental damage continued.

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the existence of valid regulatory requirements. Thus, an essential element of a claim of estoppel, that the party asserting the claim be ignorant of the true facts, is missing when a party asserts he is ignorant of pertinent provisions of a relevant regulation. *See, e.g., Tom Hurd*, 80 IBLA 107 (1984). Because knowledge of the regulation is imputed to those affected by its provisions, there can be no claim of ignorance of the rule. *Tom Hurd, supra*. The provisions of 25 CFR 211.20 and 30 CFR 221.21 (1982), requiring written permission prior to drilling, redrilling, or plugging-back and other operations, were binding upon Perlman at the time he conducted drilling on wells 1-33, 17-1, 17-2, and 20-1B.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, therefore, so much of the BLM decision as provides for a civil-money-penalty assessment in the sum of $250 for successive days violation for each infraction as modified by th is decision is affirmed. The penalty for all violations under review, is assessed in the total amount of $7,000.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

R. W. MULLEN
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I cannot agree that the penalties for the violations on these two leases should be reduced from $16,000 to $3,250 (for well 1-33) and from $12,750 to $3,750 (for wells 17-1, 17-2, and 20-1B) respectively. At well 1-33, the Bureau of Land Management concluded that "two unapproved plug backs and recompletions to other formations were performed, that is, from the Dakota to the Mesaverde and from the Mesaverde to the Fruitland."[1] It assessed $16,000 in penalties for these violations, on the basis of a total of 64 days of violation at $250/day. Its explanation for the number of days was:

> Since these violations have been determined to be continuing, a starting and ending date must be established. The starting date of the violations has been determined to be the date recompletion operations started to test the unapproved formation. The determination of the end of the period of the violations is a judgment. It could be when the BLM approved the recompletion operations or it could be the end of some particular operation determined from reports. It was determined by the Hearing Panel that the ending date should be the Well Completion Date as recorded on the Well Completion Reports, Item 17. This date is interpreted to be the date the well or formation is capable of being produced, which is after stimulation of the formations by acidizing or fracturing.

[1] Decision of Jan. 26, 1984, at 1. A "recompletion" in this context is "redrilling the same well bore to reach a new reservoir after production from the original reservoir has been abandoned." (8 Williams & Meyers, *Oil and Gas Law* 729 (1984)), except that in this case there was no production from the Dakota formation before recompletion was initiated.

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This date could have been established as the date that the final work reports were submitted to our office.

. . . . . .

Accordingly, the hearing panel sustains the decision of the Montrose District Manager and finds as follows:

Mesaverde Formation:

1. Recompletion operations started on February 17, 1982.
2. The formation was fractured on April 16, 1982.
3. Time frame of violation is 59 days.
4. Assessment: 59 days @ $250 per day - $14,750

Fruitland Formation:

1. Recompletion operations started on June 1, 1982.
2. The formation was acidized on June 5, 1982.
3. Time frame of violation is 5 days.
4. Assessment: 5 days @ $250 per day - $1,250.

Total assessment - $16,000

A fuller technical explanation was provided to the BLM hearing panel:

MR. MOORE: Any questions from the Panel?
MR. SALWEROWICZ: I'd like to try to clarify something. You say the period of ass[ess]ment for recompletion for Mesa Verde started February 17th and ended April 17th?
MR. KENDRICK: Right.
MR. SALWEROWICZ: What was it on February 17th that started it and what happened on April 17th that stopped it?
MR. KENDRICK: I'd have to look at the records. Could you help me with that, Terry?
MR. GALLOWAY: February 17th, that date started when they pulled up the 'set packer' and pulled up the hole and perforated the Mesa Verde Formation and they did work for a period of a couple of weeks. I don't have the date off the top of my head. The well was shut-in for a period of time and then the further completion work was done in the Mesa Verde up until April 17th when I believe they fraced and was the end of the assessment period when the formation could reasonably have been expected to produce.
MR. SALWEROWICZ: And then June 1st would be the date that recompletion was –
MR. GALLOWAY: Yes. The 4 1/2-inch casing was pulled and perforated in the Fruitland Formation and June 5th is when it was fraced or acidized in the Fruitland Formation, at which time the reasoning was the fromation [sic] could reasonably have been expected to be producing. There was further work carried on later, but that was the reason for those periods of time. [2]

The majority, adopting a suggestion made by Perlman to the BLM hearing panel that "recompletion" should be defined as "when you have the rig on the location,"[3] conclude that he should be penalized only for 13 days "actually spent in unauthorized recompletions."[4] In my view the purpose of the regulation requiring written permission before starting any operation–namely, to prevent waste of the oil and gas resource and damage to other resources–is better served by defining the recompletion operation as BLM did in its January 26 decision, namely beginning when operations started to test the unapproved formation and concluding when the formation is capable of

[2] Transcript of the Jan. 12, 1984, hearing at 7-8.
[3] *Id.* at 16.
[4] Majority opinion, *supra*, at 169–170.

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being produced. Since, contrary to the majority's assertion, waste or damage could occur even when drilling is not occurring, it is not unreasonable to impose assessments for the days between unauthorized drilling periods.

At wells 17-1, 17-2, and 20-1B, the violations were "dirt work for pad and road construction and the drilling commenced prior to the approval of the APD."[5] Penalties of $12,750 were assessed for a total of 48 days of noncompliance (at $250/day), computed from the day dirt work began at each site until the day before each APD was approved.[6] The majority reduce the number of days of violation to 15 (for unauthorized drilling only) because they believe BLM gave oral approval for the dirt work. They base this belief on an affidavit from one of Perlman's employees[7] and on the fact that oral approval to commence dirt work was given for well 1-33.[8] BLM's January 26 decision addresses the issue of oral approval, which was discussed at the hearing:

> 25 CFR 211.10(b) requires that written approval be obtained by the lessee before commencing operations. At the time of these violations all written approval for drilling operations on Indian leases were made by the Minerals Management Service. Oral approvals were not the policy of the Minerals Management Service in the past and are not the policy of the Bureau of Land Management. During the on-site inspection of the well locations, various statements may have been made as to the completeness or acceptability of the plan, but we find nothing to indicate that these statements should be considered an oral approval to commence earth work or drilling operations. [9]

Neither Perlman's affidavit nor the oral approval for well 1-33 persuade me that oral approval for dirt work on wells 17-1, 17-2, and 20-1B was given. Even if it was given, 25 CFR 211.10(b), which Perlman is presumed to know, states categorically that "[w]ritten permission *must* be secured from the supervisor before *any* operations are started on the leased premises." (Italics added.) Reliance by Perlman on contrary information or opinion of a Departmental employee cannot operate to vest any right not authorized by law, nor is the authority of the United States to enforce a public right lost by an employee's neglect of duty.[10] 43 CFR 1810.3. Contrary to the majority's view, Departmental policy still regards both drilling without approval

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[5] Decision of Jan. 26, 1984, at 3. Less cement was used for production casing at each well than was specified in the APD.

[6] Of this amount $750 was for failure to use the specified amount of cement. *See* note 5, *supra*.

[7] Affidavit of Duke Fennewald dated Jan. 13, 1984, Exhibit A to Appellant's Reply to BLM's Response, filed June 13, 1984:

"10. On or about September 13, 1982, Don Englishman (MMS) told me that the stipulations for the Nos. 17-2 and 20-1B Wells and the rehabilitation plans for the Nos. 17-1, 17-2, and 20-1B Wells had been received in the Grand Junction Office of the MMS. He told me at this time that Perlman could proceed with drilling operations on the Nos. 17-1, 17-2, and 20-1B Wells."

[8] Exhibit B to Appellant's Reply to BLM's Response.

[9] Decision of Jan. 26, 1984, at 4.

[10] Oral approval of any operation on an Indian lease would have clearly been neglect of duty in September 1982. For the present law, *see* 43 CFR 3162.3-2; 3165.2. *See also* the proposed amendment of 3162.3-2 at 51 FR 3929 (Jan. 30, 1986).

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and surface disturbance preliminary to drilling without approval as serious violations.[11]

I would affirm the January 26, 1984, BLM decision.

WILL A. IRWIN
Administrative Judge

DAVID SOHAPPY, SR., *ET AL.* *v.* ACTING DEPUTY ASS'T SECRETARY--INDIAN AFFAIRS (OPERATIONS)[1]

14 IBIA 100 Decided *April 4, 1986*

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) concerning the use of in-lieu fishing sites on the Columbia River.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Hunting, Fishing, and Gathering Rights: Generally--Regulations: Generally

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

2. Indians: Hunting, Fishing, and Gathering Rights: Generally

The use of Columbia River in-lieu fishing sites for permanent residences or for the permanent storage of trailers and other personal property violates 25 CFR Part 248.

APPEARANCES: Jack L. Schwartz, Esq., Portland, Oregon, for appellants; Vernon Peterson, Jr., Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Gary M. Berne, Esq., Portland, Oregon, for *amicus curiae*, The Chiefs and Council of the Columbia River Indians. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On January 30, 1985, the Board of Indian Appeals (Board) received a notice of appeal from David Sohappy, Sr., Myra Sohappy, David Sohappy, Jr., John Jackson, Henry Alexander, David Winnier, Michael Brisbois, and Michael Hunt (appellants). Appellants sought review of a November 16, 1984, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning their eviction from certain in-lieu fishing sites along the Columbia River. For the reasons discussed below, the Board affirms that decision.

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[11] *See* proposed 43 CFR 3163.3(a)(2), 51 FR 2990 (Jan. 30, 1986).

[1] This case was originally styled as *Columbia River In-Lieu Fishing Sites*.

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Background

The present case is part of a larger controversy having its genesis in four treaties signed in 1855 between the United States and the Confederated Tribes of the Umatilla Reservation, 12 Stat. 945; the Yakima Nation, 12 Stat. 951; the Nez Perce Tribe, 12 Stat. 957; and the Indians of the Tribes of Middle Oregon (Confederated Tribes of the Warm Springs Reservation), 12 Stat. 963. These treaties preserve to these Pacific Northwest Indians the right to take fish at "their usual and accustomed places" and to use these places for such purposes as the "erecting of [temporary or suitable] buildings for curing" fish taken. Because these Indians historically lived and fished along the Columbia River and its tributaries, there were numerous "usual and accustomed" fishing places along the banks of the rivers.

The construction of the Bonneville Dam, which was completed in 1937, submerged or destroyed several of the Indians' usual and accustomed fishing places. Consequently, in exchange for the peaceful relinquishment of these places, in 1945 Congress authorized the U.S. Army Corps of Engineers to acquire land along the Columbia River to replace these fishing places. *See* Act of March 2, 1945, 59 Stat. 10, 22, ch. 19, *as amended by* Act of June 8, 1955, 69 Stat. 85, ch. 131, P.L. 62. Pursuant to this authority, the United States, through the Department of the Army, acquired fee simple title to five tracts of land. Two of these sites are in Oregon, and three are in Washington State. Supervision of the sites was later transferred to the Secretary of the Interior for the benefit of those Indians from tribes having treaty fishing rights in the Columbia River. The Secretary of the Interior has delegated supervision of these sites to the Bureau of Indian Affairs (BIA), which manages them pursuant to regulations found in 25 CFR Part 248.

Title to these in-lieu fishing sites is thus held by the United States of America. Although the sites are managed for the benefit of treaty Indians, they are not Indian trust lands and are not part of any Indian reservation.

Appellants all maintain cabins or trailers at the Cook's Landing, Underwood, and Lone Pine in-lieu sites.[2] Some of these facilities have permanent electrical connections; others are apparently not used continuously, but are nevertheless not removed from the sites when not in use. Between March 16 and 18, 1984, each appellant was personally or constructively served with notice to terminate unlawful occupancy of Federal property, and remove abandoned personal property. Appellants were each informed they and/or their personal property were in violation of 25 CFR 248.6,[3] which prohibits the

[2] Appellant Michael Hunt apparently removed his trailer from the Lone Pine in-lieu site in response to a BIA trespass notice.

[3] Sec. 248.6 states in pertinent part:

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erection, placement, or maintenance of permanent dwellings or structures on the in-lieu sites. Appellants were told to remove the unauthorized structures within 30 days or BIA would refer the matter to the United States Attorney with a request that he initiate appropriate civil court action. The notice also advised appellants that BIA would assist them in locating alternative housing. The notices were signed by the Portland Area Director, BIA.

Appellants appealed these notices to appellee. Appellee determined that appellants had not filed an adequate statement of reasons for their appeal as required by 25 CFR 2.10(a). Thus, the appeal was subject to summary dismissal under 25 CFR 2.17(a). Rather than dismissing the case, however, appellee granted appellants additional time to file a statement of reasons. Nothing was filed. Consequently, on November 16, 1984, appellee issued a decision stating at page 1: "I have concluded that the Area Director's interpretation of 25 CFR Part 248 was correct. Also, these appeals are subject to summary dismissal for failure to set forth a statement of reasons for the appeals. See 25 CFR Part 2, 2.17(a)."[4]

Appellants took an appeal to the Board. On appeal briefs were filed by both appellants and appellee. In addition the Board granted *amicus curiae* status to and accepted a brief from the Chiefs and Council of the Columbia River Indians. *Amicus* is not a federally recognized Indian tribe, but states that appellants recognize it as their governing tribal organization.[5] *Amicus'* brief was submitted in support of appellants' position.

Discussion and Conclusions

The main thrust of appellants' appeal is that the Departmental regulations in 25 CFR Part 248, governing the use of Columbia River in-lieu sites, are unconstitutional, in excess of Departmental authority, contrary to the 1855 treaties and 1945 Act authorizing the sites, and destructive of traditional Columbia River Indian culture. Secondarily they argue that BIA has improperly interpreted those regulations.

[1] The Board is not the proper forum to consider appellants' main arguments. The Board does not have authority to change or declare invalid a duly promulgated Departmental regulation. *See, e.g., Jones* v. *Acting Sacramento Area Director*, 13 IBIA 124 (1985); *Zarr* v. *Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174,

"No dwellings or structures shall be erected, placed, or maintained upon the sites, except that camping facilities may be placed thereon only as herein described and fish drying facilities and fishing platforms may be erected by Indians for use during the fishing season. Facilities for camping on the sites shall be limited to tents, tepees, campers, and mobile trailers. All such tents, tepees, campers, and mobile trailers shall be removed from the sites at any time the owners thereof are not actively engaged in fishing, drying fish, or processing fish by other means."

[4] From this quotation of appellee's decision it is clear that he decided the appeal on the substance of the regulations in 25 CFR Part 248. Although appellee now argues that the appeal to him was dismissed for failure to provide a statement of reasons, his decision merely notes the appeals were "subject to summary dismissal;" there is no indication they were so dismissed. The Board will, therefore, treat the substance of appellants' arguments.

[5] Appellee states that most of the appellants are members of the Yakima Nation, which prohibits dual membership in another Indian tribe. Whatever the precise extent of *amicus'* political status, it represents an entity with which appellants identify.

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90 I.D. 172 (1983). Accordingly, the Board cannot consider any of appellants' arguments challenging the regulations in Part 248.

[2] Appellants also argue that those regulations have been improperly interpreted to prohibit the construction or maintenance of "permanent" residences on the in-lieu sites. The Board has carefully reviewed 25 CFR Part 248. The entire part, and particularly 25 CFR 248.6, clearly contemplates only the temporary use of the sites during the fishing season. Appellee properly determined that appellants' use of the sites for permanent residences or for the permanent storage of trailers and other personal property violated the regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Deputy Assistant Secretary's November 16, 1984, decision is affirmed.

JERRY MUSKRAT
Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Alternate Member

HARNEY ROCK & PAVING CO.

91 IBLA 278 Decided *April 14, 1986*

Appeal from a decision of the Burns, Oregon, District Office, Bureau of Land Management, holding appellant liable for trespass damages. O 4-246.

Set aside and remanded.

1. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads--Trespass: Generally

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

2. Trespass: Measure of Damages

Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

3. Trespass: Measure of Damages

Consistent with Oregon law, damages for an unintentional mineral trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing it and crushing it.

APPEARANCES: William D. Cramer, Esq., Burns, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Regional Solicitor,

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Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Harney Rock and Paving Co. (Harney) has appealed from a letter decision of the District Manager, Burns, Oregon, District Office, Bureau of Land Management (BLM), dated August 1, 1984. The BLM decision found appellant had removed, without authorization, between July 21, 1983, and August 1, 1984, crushed aggregate mineral materials from stockpiles owned by the United States on land patented under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 291 (1970) (repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787). BLM determined appellant had engaged in a nonwillful trespass and held appellant liable for $2,196 in damages, the estimated delivered value of the crushed aggregate, after deducting transportation costs.

BLM records indicate that prior to July 21, 1983, Harney excavated and crushed approximately 10,000 cubic yards of aggregate rock from land patented under SRHA, and stockpiled the material on the tract. The tract, SRHA patent No. 1069161, lies in the SW 1/4, S 1/2 SE 1/4, NE 1/4 SE 1/4, T. 23 S., R. 30 E., Willamette Meridian.

On July 25, 1983, BLM informed representatives of Harney the material stockpiled on this tract still belonged to the United States. To support this opinion, BLM provided Harney with a copy of the Supreme Court decision in *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 37 (1983). Shortly afterward, Harney began to remove material from the stockpiles on this tract in order to fulfill a preexisting railroad crossing construction contract with the United States Forest Service.

[1] Section 9 of SRHA, 43 U.S.C. § 299 (1970), provides in part for "[a] reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." This section also provides for bonding and compensation for damage to the surface owner. In *Western Nuclear*, the Court interpreted the minerals reservation in SRHA to include substances such as gravel which can be removed from the soil for commercial purposes. 462 U.S. at 53, 55. The Court found no reason to suppose Congress intended such material to be included in the patented surface estate. Like appellant here, Western Nuclear had acquired SRHA-patented land to extract materials for commercial road and construction projects. We find the *Western Nuclear* decision to have controlling effect in this case and hold that the aggregate removed here, like the gravel in *Western Nuclear*, was reserved to the United States, and was not conveyed along with the surface estate when the land was patented. Although the Court in *Western Nuclear* was dealing with a gravel deposit rather than a rock quarry, which the instant appeal apparently involves, the *Western Nuclear* decision is

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clearly dispositive of this issue. For example, in *Pacific Power & Light Co.*, 45 IBLA 127 (1980), *aff'd, Pacific Power & Light Co.* v. *Watt*, No. C 80-073K (D. Wyo. June 17, 1983), the Board similarly held the removal of scoria to constitute a trespass.

Departmental regulation 43 CFR 9239.0-7 establishes procedures for dealing with unauthorized removal of materials from Federal lands and provides:

> The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

An application of the *Western Nuclear* decision leads to the conclusion the United States owns this resource. Appellant's unauthorized disposal of the crushed aggregate was therefore a trespass. While Harney has not conceded this point, the commercial removal of the material from the SRHA tract is not denied. Indeed, Harney admits in its statement of reasons the removal of 366 yards of crushed stone material from its stockpile located three-tenths of a mile from the gravel pit where the material originated. However, appellant denies any trespass, contending the material was mined, processed, transported, and stockpiled before July 21, 1983, and, therefore, no trespass occurred as that term was defined by BLM Instruction Memorandum No. 84-183.

BLM responds to Harney's argument by explaining that the rock was crushed and stockpiled on a portion of the same SRHA-patented land from which it was extracted. BLM argues the Federal Government has always owned the material and did not waive its right to damages by declining to pursue mineral extractors who were active before the *Western Nuclear* decision was handed down by the Supreme Court. It is argued that excavation of the material owned by the United States was therefore a trespass whenever it occurred, and that Harney had actual notice of this fact, but chose to disregard it when it removed the stockpile in 1983. Both BLM and Harney argue each party was willing to negotiate a settlement of this dispute but the other side was unwilling to do so.

The BLM Instruction Memorandum to which appellant refers does not purport to establish a limitation on *liability* for trespass; to do so would be contrary to the precedent established by *Western Nuclear*, which affirmed a determination of damages for a trespass which occurred in 1975. The Instruction Memorandum rather acts as a guideline for the exercise of prosecutorial discretion not to collect damages. Thus, the fact the material may have been excavated prior to July 21, 1983, does not absolve appellant of liability. It was not an abuse of prosecutorial discretion to cite appellant for the trespass involved in this appeal. Pursuant, however, to the policy stated in the

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Instruction Memorandum, BLM did not assess damages for appellant's removal prior to July 21, 1983, of 10,000 cubic yards of rock, despite appellant's liability for such damages under *Western Nuclear*.

The BLM Instruction Memorandum relied upon by appellant does not excuse acts of trespass occurring prior to July 21, 1983. A change to the memorandum dated January 25, 1984, provides this explanation:

> The instructions in the fourth paragraph of Instruction Memorandum 84-183 imply that the Bureau should only seek damages for mineral materials removed 6 years prior to the date of notice. This is not the case. In all trespasses, the Bureau should attempt to collect the total amount of materials severed and the notice of trespass should reflect that total. However, the Bureau should be aware that where the amount of damages are in dispute, the trespasser may be liable for only those damages accruing within the statute of limitation period. There may also be situations where the statute of limitations period may not apply, making the trespasser liable for damages incurred outside of the normal statute of limitations period.

Instruction Memorandum No. 84-183, Change 1 (Jan. 25, 1984). It should be noted also that these agency memoranda are binding only upon employees of BLM, and are in the nature of an operating brochure for use by the Bureau. They do not have the force and effect of regulations, *see United States* v. *Kaycee Bentonite Corp.*, 64 IBLA 183, 89 I.D. 262 (1982), and lack authority to confer upon appellant a vested right to relief from liability for damages resulting from its trespass.

Harney raises several other arguments, none of which provide a basis for relieving appellant of liability for the trespass. Harney contends removal of its name from a list of contractors eligible to contract with the Government already has cost more than the amount assessed as damages for trespass. Appellant points out it has paid county and local property taxes on the stockpiled materials, that the material was taken to satisfy a Government contract bid before July 21, 1983, and that appellant is a small local contractor unable to absorb the loss of money expended in stockpiling this material. None of those arguments, however, are relevant to deciding whether a trespass occurred or to the amount of damages. However, Harney correctly objects to the method by which BLM appraised the value of the material removed by Harney. BLM determined the unit value of the crushed aggregate in the stockpile was $6 per yard, based on the actual quantities used, the payment specified in the Harney-Forest service contract, and deductions for transportation from the stockpile to the construction site. Harney argues also the value of the stockpiled material is not the same as its value in place, *i.e.*, in the pit, so that when the cost of crushing, hauling, and stockpiling is subtracted, the value of the rock taken is $36.60, not $2,196.

[2] Departmental regulation 43 CFR 9239.0-8 makes the following provision for the determination of damages in a trespass case such as this:

> The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of Mason et al. v. United States (260 U.S. 545, 67 L. ed. 396), will be the measure of

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damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

See United States v. *Marin Rock & Asphalt Co.*, 296 F. Supp. 1213 (C.D. Cal. 1969). Apparently, BLM determined there was no Oregon rule to apply in this case since the BLM decision on appeal cited 43 CFR 9239.5-1, which provides that the measure for an ores trespass in a state where there is no state law governing such a trespass would be the same measure as in the case of a coal trespass. Under this regulation, BLM is required to identify the measure for a coal trespass under Oregon law, and if there is none, apply 43 CFR 9239.5-3(a). Subsection (1) of that regulation provides that payment must be made for the value in place before severance.

BLM did not apply this rule correctly. The value of rock in place is not its value in appellant's stockpile but its value in the ground, prior to severance from the ground. *See Knife River Coal Mining Co.*, 70 I.D. 16 (1963). Furthermore, BLM's citation to a regulation which applies only when there is no state law defining the measure of damages means that BLM overlooked a decision by the Supreme Court of Oregon, *Holliday* v. *Dunn & Baker, Inc.*, 125 Or. 144, 265 P. 1096 (1928), which held, concerning damages for unintentional removal of rock from a quarry: "[W]e think the true measure to be not the value of the rock as it was ready for placing on the road, but that value less the expense of preparing it for the road." *Id.* at 1097. The court further stated: "The true measure of damages was the rock in the quarry severed and crushed, less the expense of severing and crushing it." *Id.* Thus, appellant's argument as to the proper method of determining damages is consistent with Oregon law. However, the Oregon court observed that the plaintiff at trial "did not seek by his questions to employ that standard," *id.*, and because of this deficiency in evidence, the court affirmed a jury award of damages which corresponded more closely to the royalty value of the mineral, a smaller amount than would have been awarded had the plaintiff submitted proof which corresponded to the appropriate test. The *Holliday* court faulted the plaintiff for failure to frame the questions to a witness so as to get at the true measure of damages.

The royalty standard for computing damages is not widely favored. One authority opines:

> The royalty method has been criticized on the ground that royalty is a matter of contract, not of damages for a tort, and an owner of minerals who is in a position to do so should not be deprived of the right to mine his own minerals and reap the profits himself, by a rule of damages which grants him, in the case of innocent trespass, an award of royalties merely, and thereby, in effect, compels him to execute a retroactive lease to the trespasser.

54 Am. Jur. 2d *Mines and Minerals* § 253 (1971).

In *Knife River Coal Mining Co., supra*, the Department rejected the use of the royalty standard for computing damages if state law did not

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require its use. In that case, BLM determined the trespass had been innocent, and stated that the trespass payment must be made for the value of the coal in place before severance. The Government demanded $272,305.94, which it calculated by determining the average selling price of coal and subtracting the actual mining expenses directly related to the coal extraction process. The appellant in that case, however, contended the damages only amounted to $32,650.60, or $.10 a ton for the coal mined, the royalty rate which the Government would have been paid had the deposits been under lease. The Department rejected appellant's arguments for the following reasons:

> The cases cited by the appellant involving mineral trespass are from other jurisdictions which appear to have adopted the rule that the measure of damages for innocent trespass in removing minerals from the land of another not himself engaged in mining is the usual and customary royalty. These cases do not help the appellant. It has not pointed to any North Dakota cases wherein any such "royalty" rule has been applied. Thus the appellant has failed to show that the North Dakota statute sets forth a different rule for the measure of damages for an innocent coal trespass from the rule applied by the State Supervisor. Consequently, the rule prescribed in 43 CFR 288.6 is applicable.
>
> It is, of course, completely unrealistic to say that the detriment suffered by the United States is to be measured by its loss of royalty alone. To accept damages on such a basis would be to completely disregard the detriment suffered by the Government in having its coal deposits, which it administers under the terms of the Mineral Leasing Act (30 U.S.C., 1958 ed., Supp. III, sec. 181 *et seq.*), for the good of the Nation, taken from it without regard to whether it deems it administratively desirable to dispose of them at any particular time, without regard to whether the taking of coal from this 80-acre tract would permit the most economical mining of the coal, without regard to the advantage to be gained from the selection of a qualified lessee to mine the coal, and without regard to the loss of the bonus which would have been received through competitive bidding for the property (30 U.S.C., 1958 ed., Supp. III, sec. 201). In addition to the above, such a settlement would place a trespasser in a preferred status and would penalize those who complied with the law. For example, the trespasser is not bound by the coal mining operating and safety regulations of the Department (30 CFR, Part 211) as is the lessee.
>
> In the circumstances of this case and in view of the fact that the state of the North Dakota law is such that it cannot be said with certainty that the State has prescribed any measure of damages for coal trespass different from that applied in this case, it must be held that the demand made upon the appellant was proper.

Id. at 18. In *Western Nuclear Inc., supra*, and *Pacific Power & Light Co., supra*, however, we affirmed a determination of damages based on the royalty method. In *Pacific Power & Light*, we indicated concern about BLM's use of this measure, noting we were not aware of any provision of Wyoming law which limited damages only to the royalty value of the material removed, and where no State law so limits compensation for damages, the measure of damages may be somewhat higher than the royalty rate of the material removed. *Id.* at 140 n.5, *citing Knife River Coal Mining Co., supra*. The *Knife River* and *Pacific Power & Light* cases indicate BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said "with certainty" that state law requires a different method. *See Knife River, supra* at 18.

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One point which must be made is that in the *Knife River* case, the royalty rate would have given the United States a lower compensation than a computation based upon the value of the minerals extracted less the cost of extraction. However, there may be circumstances in which the extraction costs are so large that recovering a reasonable royalty rate would ensure the United States a larger recovery. In light of appellant's allegations concerning the cost of mining, this appeal might be such a case. To apply a royalty standard for calculating damages which would more generously compensate the United States is not inconsistent with the result in the *Holliday* case. A similar issue was considered by a court in determining damages owed to the United States for a sand and gravel trespass under California law:

If a reasonable royalty rate is a correct measure of damages for good faith trespass of this type under California law, how then can one reconcile with such a measure of damages the result in Whittaker v. Otto, [248 C.A. 2d 666, 56 Cal. Rptr. 836 (1967)] in which the plaintiff was allowed to recover the value of the minerals extracted less the cost of extraction? The answer to this question is provided in National Lead Co. v. Magnet Cove Barium Corp., 231 F. Supp. 208 (W.D. Ark. 1964). In that opinion, which involves a good faith trespasser who extracted minerals, the court concludes that the plaintiff may elect between two different damage formulae, i.e. a royalty rate or the value of the extracted minerals less costs of production. The court goes on to analyze the purpose and advantages of the two formulae. As the court says on page 217:

There are two general measures of damage for trespass to minerals which are described as the "mild" and the "harsh" rules. The "mild" rule applies where the trespass is inadvertent, innocent or not in bad faith, and fixes the damages as the value of the minerals in situ. The so-called "harsh" rule, applied when the trespass is wilful, intentional, or in bad faith, allows the injured party the enhanced value of the product at the time of conversion.

Within the framework of the mild measure, there are two different guidelines to determine the in-place value of ore: first, the royalty value whereby the injured party is allowed as damages an amount equivalent to the value of the privilege of mining and removing the minerals; second, another application of the mild rule allows the injured party to recover the value of the minerals after extraction less a credit to the trespasser of its production costs. The effect of allowing the royalty method as damages is not to punish the nonwilful trespasser, but to compensate the injured party for being deprived of the possibility of extracting the minerals. Alternatively, allowing the injured party to recover the enhanced value of the converted minerals with a deduction in favor of the trespasser for the cost of mining them will also compensate for being deprived of the right of mining the minerals and developing them, while preventing the trespasser from profiting from his wrongdoing. *When the royalty method is used in applying the in-place measure of damages, the question of allowance to the trespasser of credit for his expenses in producing the minerals is not reached.* [Italics added.]

* * * The royalty formula obviously is a simpler one to apply. It does not involve the parties or the court in any complicated accounting. It provides damages to the aggrieved party even where the trespasser's operations have proved unprofitable. The other formula, as stated in the above quotation from *National Lead*, prevents the trespasser from profiting from his wrongdoing and requires him to account to the aggrieved party for all of his net profits. Surely fairness would dictate that the Plaintiff in this type of a case have such an election of remedies and I hold that such an election exists under California law. In the instant case the government has elected to claim under the royalty formula.

United States v. *Marin Rock & Asphalt Co., supra* at 1219.

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[3] Accordingly, we hold that absent a clear expression to the contrary in the law of Oregon, damages for an unintentional trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing and crushing it, whichever is greater. Because BLM did not calculate the damages to be paid by appellant in accordance with either method, this case must be remanded for BLM to do so.

In this appeal, BLM overlooked the *Holliday* case, a controlling state court decision. In *Pacific Power & Light Co., supra* at 140 n.5, this Board criticized BLM's failure to cite state law in support of its determination of damages. In *United States* v. *Marin Rock & Asphalt Co., supra* at 1216, the court observed that "neither counsel has really understood that California state law governs the damage question and neither has done an adequate job of briefing the California law on the subject." It is because this error is frequent, and is apparently easy to fall into, that this opinion has discussed the matter in detail.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Burns District Office is set aside and the case remanded for further action consistent with this opinion.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

JACK WILLIAMS

91 IBLA 335 Decided *April 21, 1986*

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application AA-54456.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Applications: Filing

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

APPEARANCES: Jack Williams, *pro se*.

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April 21, 1986

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Jack Williams has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 6, 1984, rejecting his simultaneous oil and gas lease application, AA-54456, which was selected with first priority for parcel AK-108 in the October 1984 simultaneous oil and gas lease drawing.

BLM rejected appellant's lease application because appellant signed the application form (Form 3112-6a (Apr. 1984)) in pencil, rather than in ink, as required by the instructions on the form and the regulation at 43 CFR 3102.4. In his statement of reasons for appeal, appellant questions why he was allowed to participate in the drawing if his signature was in pencil, and inquires about his $75 filing fee.

[1] The applicable regulation, 43 CFR 3112.2-1(c), provides that a simultaneous oil and gas lease application "shall be signed * * * in accordance with § 3102.4." The latter regulation provides that an application "shall be holographically (manually) signed in ink." The requirement to sign an application in ink is also set forth in the instructions on the application form. The record shows that appellant's lease application was signed in pencil.

An understanding of the background of the signature requirements for Federal oil and gas lease applications aids in resolution of this appeal. The applicable regulation with respect to the preparation of a simultaneous oil and gas lease application (formerly a drawing entry card), 43 CFR 3112.2-1(a) (1971) at one time provided only that an application must be "signed and fully executed." In *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), and subsequent cases, the Board held the term "signed" in 43 CFR 3112.2-1(a) (1971) encompassed the use of a rubber stamp to affix a signature to a drawing entry card provided it was the applicant's intention that the stamp be his signature. *See Elizabeth McClellan*, 45 IBLA 342 (1980). In *Mary I. Arata, supra* at 204, 78 I.D. at 398, the Board acknowledged that "perhaps it would be better policy to require that the signature on the drawing [entry] card be 'handwritten in ink' by the [applicant]," but refused to read such a requirement into the regulation as written. Subsequently, the Board recognized that such a signature may be applied to the application not only by the applicant himself, but also by the agent of the applicant. *See D. E. Pack (On Reconsideration)*, 38 IBLA 23, 85 I.D. 408 (1978).

Effective June 16, 1980, the Department amended 43 CFR 3112.2-1 to specifically require that a lease application be "holographically [1]

[1] Holograph is defined as "a document wholly in the handwriting of its author." *Webster's New Collegiate Dictionary* 541 (1979).

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(manually) signed in ink by the applicant." 43 CFR 3112.2-1(b) (45 FR 35164 (May 23, 1980)). In the preamble to the amended regulations, the Department stated it was expressly overturning the rule established in *Mary I. Arata, supra*, which permitted the use of mechanically affixed signatures. 45 FR 35157 (May 23, 1980). The Department explained the reason for requiring the personal handwritten signature of applicant:

> Personal signatures help to eliminate fraud against the United States and those who participate in the leasing system through agents. In may [sic] cases those who participate through agents have limited exposure to materials issued by the Department of the Interior concerning the leasing program. In view of these factors, and in order to impress on the applicant the seriousness of the leasing procedures and the statements the applicant is required to certify, it is appropriate to require a holographic signature.

45 FR 35157 (May 23, 1980). The requirement that an application be "holographically (manually) signed in ink" is currently embodied in 43 CFR 3102.4.

Hence, the avowed purpose of the requirement that an application be "holographically (manually) signed in ink" is to involve the applicant more directly in the application process and, thus, reduce the opportunity for fraud against both the United States and other participants in the leasing system.

The Board has held on numerous occasions that strict compliance with the requirements of 43 CFR Subpart 3112 is required to protect the rights of other qualified applicants. *See, e.g., Ballard E. Spencer Trust, Inc.*, 18 IBLA 25 (1974), *aff'd, Ballard E. Spencer Trust, Inc.* v. *Morton*, 544 F.2d 1067 (10th Cir. 1976). Thus, in *Betty J. Thomas*, 56 IBLA 323 (1981), and *Fred E. Forster III*, 65 IBLA 38 (1982), the Board affirmed rejection of applications with a typewritten signature, as distinguished from a holographic signature, in violation of 43 CFR 3112.2-1(b) (1980). However, we are not unmindful of the distinction between substantive and technical defects which the court sought to recognize in *Conway* v. *Watt*, 717 F.2d 512 (10th Cir. 1983).

In *Conway* v. *Watt, supra* at 516, the court concluded that the failure to date a lease application, as required by 43 CFR 3112.2-1(c) (1980), was "*de minimis*, a non-substantive error," and that it could not form the basis for a per se disqualification of the applicant where the record established the application was in fact signed within the time limitation established by regulation. The court, in essence, concluded that the absence of a date on the lease application does not necessarily establish the applicant is not qualified to receive a lease or has committed any fraud which threatens the integrity of the simultaneous leasing system, and if the Department is concerned that a fraud has been committed or that the applicant was not qualified as of a particular qualifying date, it may readily and effectively pursue those questions after a drawing has taken place.

We have applied the *Conway* rationale in a number of cases. In *Richard W. Renwick (On Reconsideration)*, 78 IBLA 360 (1984), we held the inadvertent misdating of a lease application as prior to the filing period, in violation of 43 CFR 3112.2-1(c) (1982), was nevertheless a

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nonsubstantive error where the application was in fact signed within the filing period and there was no intimation of fraud. *See also Satellite 8305136*, 85 IBLA 190 (1985). In *Charles Fox and George H. Keith, Partnership*, 77 IBLA 199 (1983), we held that even though Part B of the lease application, which serves to identify the parcels selected, was signed by two individuals, as members of the partnership/applicant, and the machine readable portion of Part A of the application indicated the applicant was a single individual, in violation of 43 CFR 3112.2-1(g) (1982) which required that lease applications be "properly completed," this was a nonsubstantive error where the identity of the applicant could be discerned by inspecting the non-machine readable portion of Part A of the application. *See also Winkler* v. *Andrus*, 594 F.2d 775 (10th Cir. 1979). In *Satellite Energy Corp.*, 77 IBLA 167, 90 I.D. 487 (1983), we held the failure to fill in the appropriate blocks on Part B of the lease application with the applicant's social security number, in violation of 43 CFR 3112.2-1(a) (1982), was a nonsubstantive error where the machine readable portion of the application disclosed the number.

We do not mean to suggest the Board will apply the *Conway* rationale across the board to all defects in simultaneous oil and gas lease applications. Indeed, as the court observed in *Brick* v. *Andrus*, 628 F.2d 213, 216 (D.C. Cir. 1980), "the Secretary can properly adopt *per se* rules if he deems them useful in the administration of the [simultaneous leasing] program–even rules the application of which may at times yield results that appear unnecessarily harsh." In *KVK Partnership* v. *Hodel*, 759 F.2d 814 (10th Cir. 1985), the court explained its *Conway* decision as follows: "[W]e did not hold that the agency may never adopt per se requirements. Read in light of its facts, *Conway* holds only that a BLM regulation may not be per se grounds for disqualification if it does not further a statutory purpose." *Id.* at 816. The per se disqualification of a lease applicant is appropriate where the failure to complete an application in accordance with the applicable regulations and instructions on the application form adversely affects the ability of the Department to establish the applicant's qualifications or to protect the integrity of the simultaneous leasing system. *See Irvin Wall*, 69 IBLA 371, 375 (1983) (Burski, Administrative Judge, concurring). Thus, in *Satellite 8309220*, 87 IBLA 93 (1985), we held, in the face of a *Conway*-based challenge, that the failure to sign a lease application properly results in the per se disqualification of the applicant, because the signature constitutes a certification of the truthfulness of the statements made on the application. These statements concern the applicant's qualifications to receive a lease and compliance with applicable regulations which protect the integrity of the simultaneous leasing system. In *Thomas N. Gwyn*, 82 IBLA 11 (1984), we similarly held, in the face of a *Conway*-based challenge, that an admission by an applicant that his application

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was not signed within the filing period, as required by 43 CFR 3112.2-1(c) (1982), properly results in the disqualification of the applicant. We distinguished those cases involving an inadvertent misdating of an application.

In the present case, appellant did not omit any required information from his application, including his signature. Rather, appellant failed to comply with 43 CFR 3102.4 by not completing his application in the proper *manner*. The signature was nevertheless valid. As the court noted in *Joseph Denunzio Fruit Co.* v. *Crane*, 79 F. Supp. 117, 128 n.16 (S.D. Cal. 1948), *vacated on other grounds*, 89 F. Supp. 962 (S.D. Cal. 1950), *rev'd*, 188 F.2d 569 (9th Cir. 1951), *cert. denied*, 342 U.S. 820 (1951), a signature includes the name of an individual impressed on a document by any known means with the intention of executing that document. *See also Roberts* v. *Johnson*, 212 F.2d 672 (10th Cir. 1954). Thus, it is immaterial to the validity of appellant's signature that it is in pencil, rather than in ink.

It appears that the holographic signature of applicant in this case has fulfilled the regulatory objective of ensuring the personal participation of applicant in the filing process in order to reduce the opportunity for fraud, notwithstanding the fact the signature was executed in pencil rather than ink.[2] There is no intimation that any information relevant to establishing appellant's qualifications to hold an oil and gas lease has been omitted or that compliance with any requirement necessary to police the integrity of the noncompetitive oil and gas leasing system has been neglected.

In conclusion, we can discern no valid statutory purpose which would be served by rejecting appellant's application in the present circumstances and believe this case requires the invocation of the rule announced in *Conway* that nonsubstantive errors are not properly treated as the basis for a per se disqualification of a lease applicant.[3] *See KVK Partnership* v. *Hodel, supra*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM for further consideration.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

[2] It should be noted that other parts of the automated simultaneous oil and gas lease application must be completed in pencil in order to permit machine processing and avoid rejection of the application as unacceptable. *See Shaw Resources, Inc.*, 79 IBLA 153, 91 I.D. 122 (1984).

[3] This case is limited to its facts, *i.e.*, a holographic signature made in pencil on the automated simultaneous leasing application, and we express no opinion whether such a signature on a lease offer in violation of 43 CFR 3102.4 would be considered a nonsubstantive error.

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April 30, 1986

BRUCE R. HARRIS
Administrative Judge

APPEAL OF YAZZIE CONSTRUCTION CO.

IBCA-2104 Decided: *April 30, 1986*

Contract No. M00C14204245, Bureau of Indian Affairs.

Sustained.

Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Intent of Parties

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

APPEARANCES: Russell E. Yates, Esq., Attorney, Durango, Colorado, for Appellant; Barry K. Berkson, Esq., Department Counsel, Santa Fe, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is timely filed by appellant, Yazzie Construction Co., on behalf of its subcontactor, Burnett Construction Co., (subcontractor), from the August 26, 1985, decision of the contracting officer (CO) denying its claim for additional compensation for labor and equipment costs in the amount of $51,376.54 (reduced on appeal to $49,900 in order to utilize accelerated claims procedures) because of differing site conditions. Appellant also seeks attorney fees, costs, and witness fees. Neither party has requested a hearing, and the appeal will be decided on the basis of the record.

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FINDINGS OF FACT

On July 23, 1984, appellant entered into Contract No. M00C14204245 (the contract), a total Indian set-aside contract with the Bureau of Indian Affairs (BIA) for the hot bituminous concrete pavement overlay of approximately 14 miles of Stone Lake Road and La Jara Road at Jicarilla Indian Reservation in Rio Arriba County, New Mexico. The amount of the contract was $1,032,699,50. A substantial completion date of September 20, 1984, was established by BIA and r[illegible]t by the contractor. The notice to proceed was issued on August 16, 19[illegible]

On September 4, 1984, a BIA road construction engineer's report noted that the existing pavement in the eastern half of one road, where the original road was built over silt and clay subgrade soils, and portions of the other road, were showing sizeable areas of distress as a result of the use of the road by the contractor's trucks, and that the areas involved had been marked for removal and patching.

The report notes that the subcontractor's main concern was that the "unforeseen" amount of patching would affect construction work costs and slow or delay the project, since it had already crushed the anticipated quantity of materials and moved its crusher to another jobsite.

On September 7, 1984, appellant wrote to the CO, calling attention to the subgrade failures, and stating that they were occurring even though the subcontractor had lowered the gross weight of its trucks below the legal limit and had rerouted its operation in order to avoid hauling over the new asphalt. The letter notes that the matter had been brought to the attention of BIA several times without any answer as to whether it intended to pay for the extra work. Appellant attributed the subgrade failures to the fact that the existing asphalt was only 3 inches thick rather than 5 to 5-1/2 inches, as shown on the cross sections of the plans.

A memorandum from the CO's representative (COR) to the CO, dated September 17, 1984, points out that BIA had warned the contractor during the preconstruction conference that it should expect considerable breakup of the existing pavement, *since similar breakups had been experienced on other similar projects*. The memorandum states: "So, although *the extra work could not have been estimated* in the original bid schedule, the contractor should have made provisions for the additional materials needed after the preconstruction conference." (Italics added.)

The memorandum also states that because pavement failures were occurring in areas where the existing pavement was 5 to 5-1/2 inches thick as well as where there was less thickness, the breakup was not primarily due to the lack of 5 inches of asphalt but to "the conditions discussed in the preconstruction conference." It recommends that the contractor be paid for the additional patching at "contract unit prices," but that any further costs (such as equipment mobilization costs) should be at the contractor's expense.

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On September 19, 1984, a memorandum from the area road engineer echoes the COR's recommendation. It discloses (for the first time) that the area road design engineer for the project had in fact estimated the need for approximately 1,500 tons of patching materials, and that the contractor had already used 2,500 tons. It concludes:

> As the correction of all distressed areas of existing pavement is a prerequisite prior to the placement of any new overlay paving materials, and as the subject contract includes methods of payment not only for the paving materials utilized for patching, but also a Roadway Surface Preparation item specifically addressed to the proper correction of the existing pavement, it is recommended the contractor be notified that the Bureau of Indian Affairs does not consider the placement of patching materials for the correction of distressed pavement as extra work.

This recommendation was accepted by the CO, and on October 10, 1984, he wrote to appellant that:

> Since the correction of all distressed areas of existing pavement is a prerequisite prior to the actual placement of the new overlay paving materials, and the subject contract includes methods of payment *not* only for the paving materials utilized for patching, but also a roadway surface preparation item, it is hereby determined that placement of patching materials for the correction of distressed pavement does *not* constitute extra work. [Italics in original.]

Various change orders were subsequently issued to reimburse the subcontractor for the costs attributable to the materials themselves (had they previously been stockpiled) and for ordinary surface preparation, but not for the costs associated with the remobilization of the crusher at the jobsite or the cleaning and filling of the places where the old pavement had failed. Consequently, on December 28, 1984, about a week after substantial completion of the job, the subcontractor wrote to appellant requesting that it submit a claim against the project for $59,739.06 in equipment costs and $19,424.04 in labor costs, a total of $79,163.10, for the mixing and placing of 2,272 tons of patching materials, less a $27,786.56 credit resulting from BIA's additional payment for the asphalt mix itself, for a total claim of $51,376.54. The letter included a breakdown of these additional costs. Appellant submitted the claim to BIA on December 31.

On January 4, 1985, the CO sent appellant BIA's final audit report, which determined that no liquidated damages were to be assessed by BIA, denied appellant's claim for additional costs, and requested that appellant sign and return three copies of the audit and of the accompanying request for final payment. Appellant thereafter apparently requested a meeting to discuss the matter, for on January 28 the CO wrote to it noting that the subject of the additional costs had previously been addressed by BIA on October 10, 1984, but agreeing to set up a meeting if appellant insisted upon one, concluding that, "The need for your subcontractor, Burnett Construction Company, to accompany you in this matter is not warranted." The letter also complains about appellant's lack of direct involvement in

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the project and about "the continued dictation of contractual matters by your subcontractor, Burnett Construction Company."

The next document in the file is a February 21, 1985, letter from appellant's attorney to the CO thanking him for the meeting and reiterating appellant's position concerning the claim, as follows:

> The unit price bid by Robert Yazzie included an estimated 250 tons for patching. A visual inspection of the roadway by Robert Yazzie and representatives of the paving subcontractor, Burnett Construction, showed several failed areas that would indeed, need patching. From a visual inspection it was impossible to anticipate wholesale failure in the road when the overlay began. The project was bid on the visual observations of approximately 250 tons as indicated. The subsequent markings by the Project Engineer of the areas to be repaired came to actually 280 tons of patching.
>
> It was not until *after* the bid and at the preconstruction conference that the general and subcontractors were informed to expect considerable road failure.
>
> It seems to me that to require Mr. Yazzie, in this case, to anticipate failures that could not be seen by either a visual inspection of the road or by notification of some kind from the specifications of the job, is unreasonable and unwarranted. The actual failures even exceeded the design engineers' estimate by over 1,052 tons. That estimate, I might add, for the record, was never disclosed to the bidders before the bid letting. It is very difficult to believe that a bidder for a project is expected to enter a bid on items not fully disclosed or even known to the B.I.A.
>
> Another point that needs be made is that it is absolutely incorrect to maintain that the additional patching that was required above and beyond the marked areas could be accomplished for the same per unit price paid for laying the asphalt. A check of area contractors leads me to believe that the cost is much more expensive when you use trucks, labor and rollers to apply the asphalt, as well as, are required to dig out the failures and haul materials away.
>
> The per unit cost paid for the 2,272 tons of extra asphalt *does not* compensate the contractor for the extra machinery and labor required. This condition could not have been anticipated and resulted in "additional work," which has even been substantiated by the September 17, 1984 Memorandum from the Contracting Officers Representative, William L. Staples, to the Contracting Officer. In that Memorandum he further admits that the "extra work could not have been estimated in the original bid schedule."
>
> Clearly the "extra work" is deserving of a claim consideration. It is not the subcontractor's responsibility to anticipate, prior to the bid, items which cannot be seen either by the plans and specifications or by visual inspection of the proposed jobsite. [Italics in original.]

On February 28, 1985, the area road engineer wrote a memorandum to the CO concerning the meeting, again recommending that the claim not be paid. The memorandum, in part, stated the following:

> While it is true the projects did require the placement of more patching materials than was estimated, the contractor's "claim is strictly for mixing and placing of patching materials" and the contractor has already been credited for the total tonnage of all patching materials placed as shown on the final audit under the contract pay Item 403(1), Hot Bituminous Concrete Pavement.
>
> The contract special provisions, sub-section 403.03, clearly states the contract unit price will be for the bituminous mixture and bituminous material (asphalt used in the mixture) complete in place. This means the "mixing and patching" costs the contractor is claiming for the additional patching materials, has already been included for payment as shown on the final audit.
>
> *Some consideration may have been recommended had the contractor sought in the subject claim to seek additional funds under contract Item 306(1), Roadway Surface Preparation, due to the additional work involved in properly preparing the old roadbeds for the placement of a larger than estimated quantity of patching materials. As the*

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contractor has not submitted his claim in this manner, this office does not recommend payment for additional compensation as requested in the subject claim. [Italics added.]

Accordingly, on March 15, 1985, the CO wrote to appellant, stating in pertinent part the following:

> Again, this office reiterates our interpretation of the contractual requirements placed before your firm. According to your claim in question, your firm is strictly seeking compensation for additional mixing and placing of patching materials. Our final audit quantities indicate that your firm has already been credited for total tonnage of all patching materials placed under the contract pay item 403(1), Hot Bituminous Concrete Pavement.
>
> If you review the contract specifications under Special Contract Provisions, sub-section 403.03, clearly states that the contract unit price will be for the bituminous mixture and bituminous material (asphalt used in the mixture) *complete* in place. This interprets to mean the "mixing and patching" costs for which your firm is seeking additional compensation has already been included for payment as indicated on the final audit document.
>
> With the determination provided, it shall be concluded that your firm will be returning the final audit documents, all signed in accordance with our instructions within the next (10) calendar days. Your prompt response shall expedite final payment due your firm. [Italics in original.]

Appellant's attorney responded on April 5, 1985, asking whether the CO's letter represented a final denial of the claim that it could appeal and, if so, where the next level of appeal might be. He also asked that the funds that were undisputed as a result of the final audit be released so that the stripping subcontractor could be paid.

On April 24, 1985, the CO wrote to appellant stating that it had not yet submitted a formal claim, and pointing out the need for certification of the claim since it was over $50,000. Appellant's attorney submitted the requested certification and documentation of the claim on May 10, and the CO formally denied the claim on August 26.

In connection with its appeal, appellant has submitted affidavits from the president and from the chief financial officer of the subcontractor. The president averred that he had made a site visit in the company of BIA's project engineer prior to bidding on the job; that no mention was ever made at this pre-bid inspection that considerable roadbed failure should be anticipated; that the project engineer indicated merely that there would be selected spots that would need patching prior to the overlay; and that the bid submitted was based upon an estimate that 250 tons of asphalt would be needed for that purpose. The financial officer averred that the units costs per ton for patching are far greater than the unit price for laying asphalt by machine; that the bid specifications should have contained an item for either unclassified excavation or for extra patching had the engineer anticipated the breakup of the road; and that the breakdown of costs for the extra labor and equipment requirements submitted with the claim are accurate and represent a changed condition.

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Government counsel on appeal, in four sentences, merely (1) denies all of the allegations of the complaint; (2) contends that the CO's decision is correct and should be upheld; (3) contends that appellant is not entitled to attorney fees; and (4) waives an oral hearing, requesting that the Board decide the appeal on the record. No authority is cited in support of the Government's legal position, and we have found none.

Discussion of the Record

Government counsel has submitted no explanation of his position that a differing site condition was not encountered by appellant's subcontractor. It might easily be inferred from the record as a whole that the CO and his advisers in connection with this contract were far more concerned about appellant's lack of direct personal involvement in the construction project than they were about the conditions its subcontractor encountered at the jobsite.

Such a lack of objectivity by BIA in determining whether the conditions actually encountered were significantly different from those that bidders might reasonably have anticipated when they bid upon the project becomes particularly significant when the appeal incorporates a request for attorney fees, as this one does. However, attorney fees is a subject for discussion under a subsequent heading.

To summarize, in support of appellant's allegation of a differing site condition under clause 52.236-02 of the contract, the record discloses the following:

1. A sworn statement by the subcontractor that:

(a) no mention was ever made at the pre-bid inspection that considerable failure in the roadbed should be anticipated;

(b) the subcontractor estimated that 250 tons of asphalt would be needed for the patching work, and that it bid on that basis;

(c) mention was made to the subcontractor of possible roadbed failure for the first time at the preconstruction conference;

(d) at the time the road construction began, the Government project engineer circled the areas needing patching, which totaled 280 tons of asphalt;

(e) 2,272 tons of asphalt were actually required to reconstruct the roadbed once roadbed failure began to occur; and

(f) the subcontractor's figures with respect to the extra labor and machinery expense incurred are accurate.

2. BIA's area road design engineer for the project had estimated a need for approximately 1,500 tons of asphalt (Appeal File Exh. (AF) 13), a fact apparently unknown to the project engineer.

3. BIA does not contend that bidders were warned prior to letting the contract that they should expect "considerable break-up of the existing pavement." Rather, the COR appears to believe that because this factor was mentioned at the post-award preconstruction conference, BIA was justified in not paying for the extra work involved (AF 11).

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4. There is no Government allegation that a more thorough prebid inspection by the subcontractor would have disclosed the potential for roadbed failure. Thus, we are entitled to assume that the subcontractor's prebid inspection was competent and adequate, and that its assumptions as to the amount of patching required were reasonable.

5. After meeting with appellant's attorney, the CO's advisers admit in writing that they might have given favorable consideration to paying the subcontractor additional costs if it had sought to recover them under a different clause of the contract than the one it used (AF 27).

In support of the Government's position, there is only a general denial. Under the circumstances, we do not find the Government's position that a differing site condition did not exist to be reasonable or justified. Nor, given the fact that the subcontractor used nine times more asphalt to patch the subsurface conditions it encountered than it had estimated, is there any doubt that the differing site condition involved a very substantial change from what appellant was led to believe it was bidding on.

Moreover, there is a clear indication that even if the project engineer did not anticipate substantial roadbed failure, the design engineer did. Certainly, if at the time of the preconstruction conference the Government already knew that roadbed failure was a likely possibility, there was no reason why it could not have discovered and disclosed this fact to potential contractors in connection with the invitation for bids.

Accordingly, appellant is entitled to recover the costs involved in the additional patching that was required, regardless of whether the differing site condition was the result of an unknown and latent defect (*Peabody N.E., Inc.*, ASBCA No. 26410 (1985), 85-1 BCA par. 17867), or mutual mistake (*Active Fire Sprinkler Corp.*, GSBCA No. 5461 (1984), 85-1 BCA par. 17868), or failure by the Government to disclose its superior knowledge of actual site conditions (*Tyroc Construction Corp.*, EBCA No. 210-3-82 (1984), 84-2 BCA par. 17308).

Discussion of Attorney Fees

The Equal Access to Justice Act, 5 U.S.C. § 504 (1982), *as amended* in August 1985, provides for the payment of attorney fees and expenses, under defined and fairly specific criteria, upon application to the Board within 30 days after its decision is final, where a party prevails by a final judgment against the Government through adversary adjudication under circumstances in which the Government's position was not substantially justified. P.L. 99-80, August 5, 1985. *But see Monark Boat Co.* v. *NLRB*, 708 F.2d 1322 (1983), and *Dunn* v. *United States*, 775 F.2d 99 (1985).

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However, since either party to an appeal before a board of contract appeals may seek review of its decision within 120 days after receipt of such decision (41 U.S.C. § 607(g) (1982)), it is clear that a judgment by this Board may not be considered final until the appeal period has expired. Thus, appellant's application for attorney fees is premature. *But see Auke Bay Concerned Citizen's Advisory Council* v. *Marsh*, 779 F.2 1391 (1986).

Decision

Accordingly, the appeal is sustained, and appellant's application for attorney fees is dismissed without prejudice, and with the right of resubmission in accordance with the statute, after expiration of the appeal period. Interest shall be paid on the $49,900 claim in accordance with the Contract Disputes Act of 1978.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

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